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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

VOL. 130,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT. *†
HON. ROBERT W. McBRIDE. §
HON. JOHN D. MILLER. ||
HON. WALTER OLDS. †
HON. SILAS D. COFFEY. †

* Chief Justice at the November Term, 1891.

† Term of office commenced January 7th, 1889.

‡ Term of office commenced January 3d, 1887.

§ Appointed December 17th, 1890, to succeed Hon. Joseph A. S. Mitchell.

|| Appointed February 25th, 1891, to succeed Hon. John G. Berkshire.

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OFFICERS
OF THE
SUPREME COURT.

CLERK,
ANDREW M. SWEENEY.

SHERIFF,
JAMES L. YATER.

LIBRARIAN,
WILLIAM W. THORNTON.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1891, IN THE SEVENTY-SIXTH YEAR OF THE STATE.

No. 15,262.

THE CITY OF NOBLESVILLE *v.* THE LAKE ERIE AND
WESTERN RAILROAD COMPANY.

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HIGHWAY.—Dedication, Revocation.—A valid dedication can not be revoked.

SAME.—Invalid Condition Annexed to Dedication, Effect.—A donor can not attach to his dedication any condition that will destroy its chief characteristic or take it from the control of the public authorities; and if such a condition be attached, it is void and the dedication valid.

SAME.—Dedication Conditioned that a Railroad Might be Laid in the Street Dedicated.—The use of a street for a railroad is a public use, and is not necessarily destructive of the character of the public way; and a condition annexed to a dedication that a railroad company should have the right to lay a track or tracks in the street dedicated is not void.

PLAT.—Construction.—A plat must be construed like a written instrument, and no part of it can be regarded as superfluous or meaningless if such a result can be reasonably avoided.

SAME.—Practical Construction.—If the meaning of the person who executed a plat is doubtful, the practical construction put upon it by the acts of parties concerned will be accepted and followed by the courts.

RAILROAD.—Additional Track in Street.—Where a donor of a street attaches a condition to it that a railroad company shall have the right to lay its tracks therein, and such company lays and uses only one track in such street, it does not lose its right to lay therein an additional

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track, even though more than twenty years have elapsed between the grant and the assertion of its right to lay the additional track.

REAL ESTATE.—*Title by Adverse Possession, Necessity of Actual Possession.*—

Color of Title.—If the claimant of land has title by deed, it is not necessary that he should take actual possession of all the property granted; and this is true even though he have no more than color of title, actual possession of a part being such possession of all the property as will give title by lapse of time. The *pedis possessio* is only necessary where there is no color of title.

From the Hamilton Circuit Court.

A. F. Shirts, M. Vestal and J. Stafford, for appellant.

R. R. Stephenson, W. R. Fertig, W. E. Hackedorn and F. S. Foster, for appellee.

ELLIOTT, C. J.—The city of Noblesville prosecutes this suit upon the theory that the railroad company is asserting an unfounded claim to construct and maintain an additional track upon and along certain streets of the city. The company claims the right to construct and maintain the track under a grant from William Conner.

In 1849 William Conner, then the owner of the land which this controversy concerns, made a plat of an addition to the town of Noblesville, and caused it to be recorded. The plat is thus entitled: "Donation by William Conner for depot at Noblesville. Addition to Noblesville." Spaces are given on the plat representing streets and alleys, and a space is designated for a "depot building." The designation is made by enclosing a space within lines, and by writing in the space so enclosed the words, "Lot for depot building." Red lines appear on the plat, running along and across the spaces marked out and designated as streets. These red lines are five in number, and they lead to and pass the lot designated on the plat as "Lot for depot building." A short time after the plat was executed and recorded Conner executed a deed to a predecessor of the appellee, in which he conveyed the lot above mentioned to that company, and that deed also conveyed the "free use and occupancy

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of the streets in said addition for such railroad tracks, side tracks, switches and turns as said company by its directors may think proper." Possession was taken by the grantee. The main line of road was constructed as early as 1851. A side track was soon after constructed, and the station erected. The tracks originally constructed have been continuously in use since they were laid down.

It is not necessary to decide whether the dedication made by William Conner is valid as a statutory dedication, for, if it was effective, either as a statutory or common law dedication, the municipal corporation acquired a public easement in the land dedicated. After the acquisition of the easement the dedication became irrevocable, for a valid dedication can not be revoked. See authorities collected in Elliott Roads and Streets, pp. 89, 92, 112. If, therefore, there was an effective dedication, and one of an absolute nature, the deed made by Conner, after the execution of the plat, could not divest the public rights vested by the dedication. But the question of difficulty in this instance is, what was the nature and effect of the dedication evidenced by the plat? Our conclusion is that the dedication was not an absolute or unrestricted one, but was, on the contrary, limited and restricted by the donor at the time he made it. See authorities referred to in Elliott Roads and Streets, pp. 91, n. 2, 110. *Miller v. City of Indianapolis*, 123 Ind. 196.

The red lines on the plat can not be regarded as meaningless, for the plat is a written instrument, and no part of a written instrument can be regarded as superfluous or meaningless if such a result can be reasonably avoided. The lines run to and from a lot which the plat designates as a place for a railroad station, and the fair implication is that they were intended to designate railroad tracks. They can, indeed, have no meaning at all, unless they do designate tracks leading to and from a railroad station. The statement on the plat, "Donation for depot at Noblesville," indicates the main purpose of the donor, and by assigning to the red

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lines the meaning designated by us that intention is given effect, and the entire instrument made operative. If, however, we are in error in affirming that the plat on its face shows that the railroad company was given a right to lay tracks on the streets laid out by Conner, the ultimate result would not be affected, for the long-continued use and the continuous acts of the parties have construed the plat to mean what we have asserted, namely, that, while the streets are dedicated to the municipality, the dedication is limited by the donation made to the company of the right to use and occupy the streets with its tracks as indicated by the red lines on the plat. The rule is well settled that if the meaning of an instrument is doubtful, the practical construction put upon it by the acts of the parties will be accepted by the courts. *Willcuts v. Northwestern, etc., Ins. Co.*, 81 Ind. 300, and cases cited; *Johnson v. Gibson*, 78 Ind. 282, and cases cited. There is no reason why that rule should not apply to such a case as this.

Assuming that the dedication is limited and burdened by the right donated to the railroad company, the question which next presents itself is whether the limitation is effective. Counsel contend that "a party can not dedicate a street to the use of the public, and reserve in the street a private use for an individual." In support of this contention counsel refer to *Dillon Munic. Corp.*, section 492, and to the case of *City of Des Moines v. Hall*, 24 Iowa, 234. We fully assent to the proposition of counsel; and we are, indeed, prepared to carry the doctrine somewhat further, for we believe that a donor can not attach to his dedication any condition that will impair the police power. The dedication will be upheld, and the condition adjudged ineffective. *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555; *Richards v. City of Cincinnati*, 31 Ohio St. 506; *Jackson v. Hartwell*, 8 Johns. 422; *Fitzpatrick v. Robinson*, 1 H. & B. 585, and authorities cited in *Elliott Roads and Streets*, 109.

We affirm it to be true that a condition can not be annexed

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to the dedication of a highway which will destroy its chief characteristic, or take it from the control of the duly authorized public officers, but in this instance no such condition is annexed, nor is the highway taken from the control of the municipality. No such condition is annexed for the reason that the occupancy of a highway by a railroad does not destroy its character. It remains a highway notwithstanding its use by the railroad company. *Louisville, etc., R. W. Co. v. Phillips*, 112 Ind. 59.

The control over the highway is not taken from the municipality, for it may still exercise the police power over it; the only limitation is that which grows out of the right to use it for railroad purposes. Use of a highway for a railroad is a public use, and is not necessarily destructive of the character of the public way. The authorities which deny the right to annex a condition to a dedication incompatible with its character and use, are not of controlling force where the annexed condition is that a railroad company may also use the highway.

The donation and the deed gave the appellee title, and, as there was title, it was not necessary that it should have taken actual possession of all the property granted it. Even where there is no more than color of title, actual possession of part is such possession of all the property as will give title by lapse of time. *Wright v. Kleyla*, 104 Ind. 223.

The *pedis possessio* is only necessary where there is no color of title. It is clear, therefore, that the company acquired title to the entire easement granted by Conner, and that it has the right to lay the additional track which it proposes to construct, for that right is fully within its grant. A like conclusion was reached, although by a somewhat different line of reasoning, in the cases of *Chicago, etc., R. Co. v. Eisert*, 127 Ind. 156; *White v. Chicago, etc., R. R. Co.*, 122 Ind. 317.

Judgment affirmed.

Filed Dec. 10, 1891.

The Board of Commissioners of Pulaski County v. Shields.

No. 14,830.

THE BOARD OF COMMISSIONERS OF PULASKI COUNTY v.
SHIELDS.**COUNTY COMMISSIONERS.—Power to Employ Superintendent of County Asylum.**

—A contract by a board of county commissioners employing a person as superintendent of a county asylum for a period of five years is valid and not contrary to public policy; but such a contract does not prohibit the board discontinuing the asylum.

SAME.—Is a Continuous Corporation.—Contracts.—The board of commissioners of a county is a corporation, a continuous body; and while the personnel of its membership changes, the corporation continues unchanged. Its contracts are the contracts of the board, and not of its members.

SAME.—Reports of Superintendent of County Asylum, Waiver of.—The board of county commissioners have power to waive their right to demand of the superintendent of the county asylum the report required by statute; and when they have waived the right to demand such a report they can not insist, in an action on his contract of employment with them, brought by him, that he in that respect has not fulfilled his contract.

SAME.—Superintendent of County Asylum Engaging in other Business.—If the superintendent of a county asylum engages temporarily in other business, with the consent of the board of county commissioners, but supervises and controls the management of the asylum under the direction of the board, and causes the work to be done at his own expense, and no one is damaged thereby, such loss of time on his part is not such a breach of his contract as justifies the board in rescinding the contract and discharging him from their employment.

From the Cass Circuit Court.

J. C. Nye, S. T. McConnell, D. B. McConnell and A. G. Jenkins, for appellant.

D. C. Justice, N. L. Agnew and B. Borders, for appellee.

McBRIDE, J.—The Board of Commissioners of Pulaski county by written contract employed the appellee to superintend the county asylum and poor farm of that county for a term of five years from April 1, 1884.

The complaint alleges: "That the plaintiff on said first day of April, 1884, entered upon the discharge of his duties as such superintendent, and continued in discharge of his duties under said contract, and faithfully performed all the

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conditions upon his part until the 22d day of March, 1887, at which time the said county, acting by its Board of Commissioners, to wit: George H. Barnett, Clark R. Parcel and Charles Becker, without any cause and without right, excluded and dismissed the plaintiff from his said employment as such superintendent of said county asylum and poor farm, and have at all times since, without any cause or excuse, excluded and prevented the said plaintiff from said employment and the discharge of his duties thereof. * * * * That he has at all times been ready, willing and able to perform his part of said contract," etc.

The principal controversy in the case is as to the validity of the contract, the appellant insisting that it is "void." They base this contention upon the ground that the board of county commissioners has no power to make a contract employing a superintendent of the county asylum and poor farm for a term of five years; that such a contract is against public policy; that to uphold it would "put it in the power of one board of commissioners to completely tie the hands of its successors;" and that such a contract would operate as an abridgment of the "administrative, executive and legislative" power of the board to an extent which the law will not tolerate.

These questions are raised by the action of the circuit court in overruling a demurrer by the appellant to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

This court has had frequent occasion to consider the nature and extent of the powers possessed by boards of county commissioners.

Many of the cases are reviewed in the case of *Platter v. Board, etc.*, 103 Ind. 360.

The court says, 369: "The law commits to the board of commissioners very extensive powers over the property, finances and institutions of the county." * * * It has "very broad powers over county property and institutions,

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and its discretion in the control and disposition of such institutions is seldom if ever interfered with by the courts.

* * * There are numerous decisions in our own reports declaring that the board of commissioners constitutes a corporation, and that its rights, duties and liabilities are substantially the same as those of a municipal corporation."

In *State, ex rel., v. Clark*, 4 Ind. 315, it was said: "In legal contemplation, the board of commissioners is the county."

That boards of county commissioners, in common with municipal corporations and other corporations of like character, may make valid contracts for the employment of agents to aid in the administration of the affairs of such corporation, is beyond controversy. As is said by the court in *City of Indianapolis v. Gas, etc., Co.*, 66 Ind. 396, "A municipal corporation, not having either body, limbs, feet or hands, but being merely a legal entity, can not execute its own acts, nor administer its own affairs. To do this it must employ persons, other corporations, or agencies of some kind, and to employ them and agree to pay them is to make a contract; and if it could not make such contracts, and was not bound thereby, it could not carry on the purposes or attain the objects for which it was established."

See, also, *City of Logansport v. Dykeman*, 116 Ind. 15; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Duncan v. Board, etc.*, 101 Ind. 403; *Crow v. Board, etc.*, 118 Ind. 51; *City of Vincennes v. Callender*, 86 Ind. 484. In *City of Indianapolis v. Gas, etc., Co.*, *supra*, the power of a city to make a valid contract for gas to light its streets and public buildings for the period of twenty years is affirmed, and in *City of Valparaiso v. Gardner, supra*, the court holds that a city may make a valid contract for a supply of water for a period of twenty years. See, also, *Crowder v. Town of Sullivan*, 128 Ind. 486.

Being charged by law with the performance of certain duties, even if no express authority was conferred to contract with and employ the necessary agencies to compass those ends, such power would be inferred.

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Boards of county commissioners are not only authorized to provide an asylum for the poor of such county, but are by statute expressly authorized to employ a superintendent of such asylum.

Section 6090, R. S. 1881, provides as follows: "It shall be lawful for the board of county commissioners of any county of this State, whenever it may deem it advisable, to purchase a tract of land in the name of such county, and thereon to build, establish, and organize an asylum for the poor, and to employ some humane and responsible person, resident in such county, to take charge of the same, upon such terms and under such restrictions as the board shall consider most advantageous for the interests of the county, who shall be called the 'superintendent of the county asylum.'" This certainly confers a very wide range of discretion upon such boards.

To employ a superintendent to do certain things on certain "terms" is to contract with him.

The power thus conferred upon boards of county commissioners to employ and contract with a superintendent, in the absence of any restriction contained in the statute, of necessity carries with it the power to fix some term of service or time of duration of such employment. It was undoubtedly competent for the Legislature to place any restrictions they might see fit on the board in the employment of a superintendent, and provide that no contract of employment should be for longer than a given time, or even to forbid making a contract of employment for any certain and definite term. They have, however, not seen fit to do so. It must not be understood that there are no bounds to the discretion thus granted. We do not wish to be understood as holding that their action in the making of such contracts is not subject to review, and that a contract would not be annulled if it was shown that the board had abused its discretion in making it, but we do hold that unless it appears that there

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has been a clear abuse of discretion, and no fraud is shown, the courts will not interfere.

It is insisted, however, that this contract is void upon other grounds,—that it is in contravention of public policy, for the reason that to uphold it would put it in the power of one board of commissioners to bind the hands of its successors, and that it operates as an unwarranted abridgment of the “administrative, executive and legislative” powers of the board.

The first of the reasons assigned rests upon an erroneous conception of the constitution of the board of county commissioners—that that body consists of a series or succession of boards, one following the other. As we have heretofore said, the board of commissioners is a corporation, representing the county. From a legal stand-point it is the county, as is said in *State, ex rel., v. Clark, supra*.

It is a continuous body. While the *personnel* of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is, that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason. As individuals they are not parties to it.

This is clearly shown by Zollars, J., speaking for the court in the case of *Reubelt v. School Town of Noblesville*, 106 Ind. 478, where it was contended that a contract by the school board, employing a superintendent of the schools of the town, was void as against public policy, because it was made in May, preceding the annual election, in June following, of a new school trustee, and the reorganization of that board; and the employment was for a year.

It is there said: “The reorganization of the board, as required by the above statute, is not, in legal contemplation, the creation of a new board, as distinguished from an old

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board. The board of school trustees is a continuing body, just as a common council of a city is a continuing body. The members change with the expiration of terms and the election of new members ; but, together, the members constitute the board of school trustees which represents the school corporation. * * * The question, therefore, is not as to the authority of one board to bind the corporation by a contract to be performed after that board shall have ceased to exist, and another shall have been organized, but whether the board of school trustees can bind the corporation by contracts which are not to be performed until after the time when a new member of the board is to be elected." The court held the contract valid. See, also, *Wait v. Ray*, 67 N. Y. 36.

Counsel for the appellant cite the case of *Board, etc., v. Taylor*, 123 Ind. 148, as sustaining them in this controversy, and as decisive of the questions involved.

That was a case where a board of county commissioners had made a contract with a firm of attorneys to act as county attorneys for a period of three years from a certain date in the future—the date fixed being the day when one of its members would retire from the board and his successor would qualify. The attorneys thus contracted with never actually entered upon the employment, and never in fact rendered any services under it. The board of commissioners treated it as void, ignored it, and employed another attorney. The court held the contract void upon the ground that the board had no power to make the contract for that length of time. It is not necessary that we here express either approval or disapproval of that case, as applied to the facts then before the court. It is enough to say that one fact which no doubt had great weight in leading the court to the conclusion reached does not exist in this case. The contract there involved was for the employment of a county attorney or attorneys, who, by virtue of such employment, would be the attorney for the board.

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The relations existing between an attorney and his client are unlike those ordinarily existing between employer and employee. They are of an intimate and confidential character. The attorney, instead of acting under the direction and instruction of his client, is himself largely the adviser and instructor. One of the principal duties imposed upon him by his employment is to advise as to the law. There is, therefore, much reason in holding that the board, as personally constituted, should be at all times free to select its own confidential legal adviser.

No such reasons exist in the case of the employment of a superintendent of the county asylum and poor farm. Nor can it be said that there is in such a contract as is involved in this case any unwarranted abridgment of any of the powers of the board.

The superintendent is not an officer, but is a mere employee of the board. The statute specifies certain of his duties, but it further provides (section 6091, R. S. 1881) that he shall "perform such other duties as the board of county commissioners shall, from time to time, establish, order, and direct, consistent with the laws of this State."

The statute which authorizes his employment enters into and forms a part of the contract made with him. The contract also expressly stipulates that he shall perform his duties "under the direction and supervision of the said board of commissioners," to keep accounts, and "whenever required render an account to the board of commissioners."

It is also contended that, while the board of commissioners may in their discretion change the location of a poor farm and county asylum, or may, under section 6098, R. S. 1881, discontinue it and dispose of the property, the effect of such a contract, if sustained, would be to deprive them of the power to do either for five years.

We are unable to see how any such result could possibly follow. If the contract sought in any way to bind the commissioners not to change the location of the poor farm for

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five years, or to bind them not to discontinue it for that length of time, we think such attempted control of the future action of the board would be void, and if such invalid provisions were so connected with the remaining terms of the contract that they could not be eliminated and leave a valid contract remaining, the contract would also be void. The contract here involved, however, only binds the superintendent to superintend the poor farm of the county, without specifying its location. The contract, is of course, executed in view of the power of the board in the exercise of a sound discretion to discontinue the poor farm entirely, or to change its location. If its location is changed his duties will continue on the new farm.

As above said, the statute which authorizes his employment enters into and forms a part of the contract. Therefore, although the contract is in terms for five years, the law carries with it an implied condition, subjecting it to the express discretionary power given the board to discontinue the farm and asylum altogether.

There is nothing in the contract which purports to attempt to bind the board not to discontinue the farm at any time, if in its discretion, the best interests of the county require it, unless the mere fixing of the term of employment can be so construed.

We think the contract such as the board had the power to make, that it does not contravene public policy, that it is valid and binding, and that it can only be rescinded for cause, or by consent of both parties.

The complaint alleges that the appellant acted "without cause." The demurrer admits this. The court did not err in overruling the demurrer.

This brings us to the consideration of the questions raised by the motion for a new trial.

Thirty reasons are assigned for a new trial. Counsel, however, only question in argument the action of the court in

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giving instructions numbered 7 and 9, and in refusing to admit certain testimony of two witnesses.

They also argue that the verdict is not sustained by sufficient evidence.

The defence was upon the ground that the appellee had violated the contract to such an extent that the appellant was authorized to and did rescind it. Among the specific violations of the contract charged was the failure of the appellee to make to the commissioners the reports required by the law, and that the appellee had, while acting as superintendent, been a candidate for sheriff, and, while pressing such candidacy, had neglected his duty as superintendent.

The court, in its sixth instruction, charged the jury that the appellee must not only prove the execution of the contract, but must show full performance by himself, or he could not recover.

The seventh instruction related to the reports which he was required to make to the board, and instructed the jury that if he had failed or neglected to make such reports he could not recover unless they should find from the evidence that the making of the reports had been waived by the appellant. They were further instructed as to what evidence they might consider in determining whether or not the board had waived the making of such reports. We see no error in this. The reports are required for the information of the board, and we see no reason why it has not the power to waive them. The propriety or expediency of such waiver is a matter we need not here consider. The members of the board are, however, required to exercise a personal supervision over the poor farm and asylum, and to make personal inspections. The reports are intended to furnish them additional information upon certain matters, and we think if they see fit to waive making them, and actually do so, they can not afterward rescind the contract upon that ground.

By the ninth instruction the court charged the jury that if they found from the evidence that during the year 1886

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the appellee was a candidate for sheriff, but that before he became a candidate the board in regular session, or a majority of its members, consented to such candidacy, and that while a candidate he still "kept supervision and control of the management and superintendency of the said poor farm and asylum under the supervision and direction of the board of commissioners, and that he caused the work to be done at his own expense, and the county, nor the asylum, nor the paupers, nor poor farm suffered damage thereby. Such loss of time on his part would not be such a breach of his contract as would justify the board of commissioners in rescinding the contract and discharging the plaintiff from his said employment." This instruction is not erroneous.

While George H. Barnett, one of the commissioners, was testifying as a witness the appellant sought to prove by him that when he visited the asylum for the purpose of inspection some of the paupers complained to him of their treatment. It was not claimed that the appellee was present or heard the complaints. The court rightfully excluded the testimony. It was competent to prove any fact showing neglect of duty or violation of the contract by the appellee, but such evidence as was here offered would be mere hearsay and would have no tendency to prove the fact of improper treatment.

The appellant also offered to prove by this witness and another how much wheat would in their opinion be required to properly "bread" the inmates of the asylum, including the family of the superintendent. The court did not err in excluding this testimony.

While the evidence is upon many points conflicting, there is much evidence tending to sustain the verdict in every material particular. The jury and the court below having weighed it and decided favorably to the appellee, we can not disturb the verdict upon the weight of the evidence.

Judgment affirmed.

Filed Dec. 1.

Lillie v. Trentman.

No. 15,363.

LILLIE v. TRENTMAN.

PRACTICE.—Law of the Case.—The principles of law established on a former appeal, so far as applicable, remain the law of the case on a second or other appeal, and through all of the subsequent steps taken in said cause, and must be followed, whether right or wrong.

SAME.—Rule as to Pleading on Second Appeal.—Where the sufficiency of a pleading has been passed upon by the Supreme Court, that ruling will be followed on a second or other appeal, unless such pleading has been amended so that its character is materially changed.

PLEADING.—Reply to Plea of Payment, Admitting that Part Was Paid.—To plea of payment in full, a reply admitting a part payment and averring that no more was paid is sufficient.

SPECIAL JUDGE.—Objection to, Delay in Making.—When a judge has been called or an attorney appointed to try a cause, and no objection is made to the call or his appointment at the time, or to his sitting in the cause at the time he assumes jurisdiction, all objections to the regularity of such appointment are waived.

From the Allen Circuit Court.

R. S. Robertson and R. Lowry, for appellant.

J. Morris, J. M. Barrett and W. G. Colerick, for appellee.

MILLER, J.—Appellant's counsel state the points he desires this court to pass upon in these words:

"*First.* Was the action of the court correct in sustaining the plaintiff's demurrer to the amended second paragraph of the defendant's answer?

"*Second.* Did the court err in overruling the defendant's demurrer to the plaintiff's reply to the first and third paragraphs of the defendant's answer?

"*Third.* Had the Hon. A. A. Chapin, assuming to act as special judge, authority to proceed with and try the cause as such judge over the objection of the defendant, and over his motion to remand the cause to the cognizance of the regular judge of the court?"

Upon a former appeal of this case the judgment of the court was reversed in order that the cause might be tried in

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141	402
130	16
146	313
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148	617
130	16
154	156
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165	70

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accordance with the principles of law therein indicated. *Trentman v. Fletcher*, 100 Ind. 105.

The principles of law established on the former appeal, so far as applicable, remain the law of this case through all of its subsequent stages, and must be adhered to, whether right or wrong, not only in the trial court, but in this court, on a second, or any subsequent appeal. *Mason v. Burk*, 120 Ind. 404; *McCormick, etc., Co. v. Gray*, 114 Ind. 340; *Pittsburgh, etc., R. W. Co. v. Hizon*, 110 Ind. 225; *Forgerson v. Smith*, 104 Ind. 246; *Jones v. Castor*, 96 Ind. 307; *Anderson v. Kramer*, 93 Ind. 170; *Board, etc., v. Indianapolis, etc., R. W. Co.*, 89 Ind. 101; *Gerber v. Friday*, 87 Ind. 366; *Board, etc., v. Jameson*, 86 Ind. 154; *Braden v. Graves*, 85 Ind. 92; *Richmond, etc., R. R. Co. v. Reed*, 83 Ind. 9; *Dodge v. Gaylord*, 53 Ind. 365.

Where the sufficiency of a pleading has been passed upon by this court, that ruling will be adhered to on a second appeal, unless the same has been amended so as to materially change its character. *City of Logansport v. Humphrey*, 106 Ind. 146; *Richmond, etc.; R. R. Co. v. Reed, supra*.

This court, on the former appeal, having held the second paragraph of the separate answer of Lillie bad on demurrer, we are to determine whether the appellant has by his amendment so changed the character of the pleading as to free it from the infirmities it then contained. *Bliss v. Douch*, 110 Ind. 296.

The objections to the pleading as a defence, as stated in the opinion of the court, are twofold:

1. That the agreement that Trentman should give Fletcher, who was the principal in the note sued on, "further credit for such goods as he, Fletcher, should need to carry on said business," is too vague, indefinite and uncertain to be the basis of a contract between the surety and Trentman.

2. The note, which called for the payment of a definite sum of money at a time fixed by Fletcher and Lillie, was by

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the terms of this oral agreement to be paid by Fletcher from time to time "until said note was paid and satisfied." This was a variance of its terms.

By the amendments made to the answer, after its return from this court, its character was changed from a plea of payment to a plea of failure of consideration ; also, referring to the payments to be made by Fletcher and credits to be made on the note, the words "from time to time" contained in the original answer are omitted from the answer as amended.

We are of the opinion that by this amendment the objection that the agreement between the appellant and Trentman was a variance from the terms of the note in suit is obviated.

If there was no variance between the terms of the contract declared upon in the answer and that evidenced by the note, it was immaterial whether the former contract was in writing or rested in parol.

So far as we have been able to discover, no effort has been made to so amend this paragraph of answer as to remove the objection pointed out in the opinion of the court on the former appeal, to the effect that the agreement was "too vague, indefinite and uncertain to be the basis of any contract," and, therefore, insufficient to support the promise relied upon.

This court having held that the agreement was without consideration, and no amendment having been made that obviated that infirmity, the court did not err in sustaining the demurrer to the second paragraph of the amended answer.

The next question presented is the action of the court in overruling the demurrer to the reply to the first and second paragraphs of answer.

The first paragraph of answer is set out in the opinion in *Trentman v. Fletcher, supra* (106), and it is said in that opinion: "Treating all that is said about the agreement upon

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which Lillie signed the note as surplusage, the first paragraph can be held good as a plea of payment."

The third paragraph of answer avers that the defendant executed the note as the surety of his co-defendant, Fletcher, and says that before the commencement of the suit the note was fully paid and satisfied.

The reply is as follows: "The plaintiff, for replication to the first and third paragraphs of the separate answer of the defendant Lillie, says that he admits that the defendant paid on said note the sum of twelve hundred and twenty dollars and eighty cents; that said sum was paid to the plaintiff by said Fletcher, pursuant to an entry made by the plaintiff at the time of the execution of said note in the pass-book of said Fletcher, in these words: 'Aug. 27. Note for \$3,299.55, signed "C. C. Fletcher & James Lillie." All money Cr. here to be applied on this note.'

"That all the credits entered in said pass-book amounted to said sum of \$1,220.80, and no more; that all sums other than the above sum of \$1,220.80 received by the plaintiff from the defendants, or either of them, after the execution of said note, were received by him on the separate indebtedness of said Fletcher to the plaintiff, and not on said note. Wherefore the plaintiff demands judgment."

Rejecting a considerable portion of the reply as surplusage, we have left an admission of the payment of \$1,220.80, and an averment that no more was paid on the note. This was sufficient to meet the allegations of payment contained in the answers, and made the reply good on demurrer.

The remaining point argued by counsel for the appellant relates to the jurisdiction of the special judge called to try the case to finally dispose of the case, after the defendant had asked to have it remanded to the regular judge of the court.

The transcript informs us that on the 1st day of October, 1888, this entry was made in the order-book of the court:

"Come the parties, and the presiding judge being of coun-

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sel for defendant, and disqualified to try said cause, Hon. A. A. Chapin, judge of the superior court of Allen county, is called to try said cause."

The next entry in the cause shows that the special judge appeared, assumed jurisdiction, and proceeded to make up the issues.

No objection was made to the action of the regular judge in calling a special judge to try the cause, nor to the special judge taking jurisdiction of the same, until the 26th day of April, 1889, when a jury was in the box empanelled to try the cause, upon issues which had been made before the same special judge, when a motion was made to remand the cause to the regular judge.

The record shows that the appellant had appeared before the special judge and filed pleadings, presented motions, argued questions of law, and presented bills of exceptions, and had the same signed by him.

The motion to remand the cause alleged simply a want of jurisdiction in the special judge to proceed further. In the brief of counsel this want of jurisdiction is said to have been occasioned by the failure of the regular judge to make out an appointment of the special judge in writing, and because no affidavit was filed for a change of venue from the regular judge.

It was not only the privilege, but the duty, of the regular judge to refuse to sit as judge in the hearing of a cause in which he had been of counsel for one of the parties, and to make provisions for the hearing of the cause by some competent person. It is not necessary for such judge to wait for some one to inform him of a fact of which he has as much knowledge as the affiant. *Joyce v. Whitney*, 57 Ind. 550.

It is probable that we might presume that the appointment of the special judge was properly and legally made (*Bartley v. Phillips*, 114 Ind. 189), but we do not care to put our decision on that ground.

What we do decide, is, that when a judge has been called,

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or an attorney has been appointed to try a cause, as provided in section 415, R. S. 1881, and no objection is made to his appointment at the time, or to his sitting in the cause at the time he assumes jurisdiction, all objections to the regularity of such appointment shall be deemed waived.

A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings, or not disposed to go into trial, when the cause is ready for trial, to be able, in a moment, to arrest proceedings, and oust the jurisdiction of the judge, can not be tolerated. The whole tendency of all the later cases in this court has been in the direction of requiring such objections to be promptly made, and to hold that, if not made promptly, they are to be deemed waived. *Greenwood v. State*, 116 Ind. 485; *Bowen v. Swander*, 121 Ind. 164; *Littleton v. Smith*, 119 Ind. 230; *Bartley v. Phillips*, 114 Ind. 189; *Schlunger v. State*, 113 Ind. 295; *Cargar v. Fee*, 119 Ind. 536; *Smurr v. State*, 105 Ind. 125; *Board, etc., v. Courtney*, 105 Ind. 311.

Judgment affirmed.

Filed Dec. 10, 1891.

No. 15,351.

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THE HOOSIER STONE COMPANY ET AL. v. MALOTT ET AL.

WAY.—Use by Strangers.—Diversion of Use.—The grant of the right to transport stone from a designated tract of land over a certain tract owned by the grantor, can not be used with the permission of the grantee by a third person for the purpose of carrying stone quarried in another tract of land.

PLEADING.—Allegations of Ownership.—Sufficiency as to.—See opinion.

From the Lawrence Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellants.

N. Crook and *J. E. Boruff*, for appellees.

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OLDS, J.—The facts as found by the court in this cause are, in substance, as follows :

On the 19th day of December, 1883, the appellees, Josie F. Malott and John E. Malott, and the appellant William E. Malott were the owners of the southeast quarter of the southeast quarter of section 33, township 6 north, range 1 west, in Lawrence county, Indiana; also other lands intervening between said tract in section 34, same township and range, and the Louisville, New Albany and Chicago railroad, which ran through said section 34. On said day they sold and conveyed to the appellant the Hoosier Stone Company, in consideration, of \$3,000, by warranty deed, said first-described forty-acre tract of land, together with a right of way for a railway switch track from the line of said railroad over the said lands of the appellees and said William E. Malott, in said section 34, to said forty-acre tract conveyed as aforesaid, and pursuant thereto put said Hoosier Stone Company in possession thereof. The Hoosier Stone Company constructed a railroad switch from said railroad to said forty-acre tract so conveyed to it, which it has since used in conveying its stone quarried on said forty-acre tract to said railroad, and over which said switch said railroad company has conveyed its cars in transporting said stone so quarried on said forty acres, at the instance of said Hoosier Stone Company. On the 1st of February, 1889, the Hoosier Stone Company, without the knowledge or consent of appellees, and for a valuable consideration, subleased and conveyed to appellants Gilbert and Henry Perry, Frederick, William and Sarah Mathews and Phillip N. Buskirk the right to pass over and use said switch and way and to transport their stone over the same, said parties being engaged in quarrying stone in considerable quantities on lands of their own adjacent to said forty-acre tract so sold to the Hoosier Stone Company, and the sublessees have ever since, almost daily, had their stone conveyed over said switch by means of locomotives and cars of the Louisville, New Albany and Chicago

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Railroad Company, and they claim the legal right, by reason of the facts aforesaid, to continue so to do, and the Hoosier Stone Company claims the right to sublease said right of way, and denies the right of the railroad to run over said switch, except as licensed so to do by said Hoosier Stone Company.

The appellees filed their complaint in this action, alleging the facts in detail, and describing the land, asking that the lessees of the stone company be perpetually enjoined from the further use of the switch and right of way, and for damages.

The appellants demurred to the complaint. The demurrer was overruled, and exceptions were reserved, and this ruling is the first error assigned and discussed. It is urged by counsel for the appellants that the complaint is not sufficient, for the reason that it does not allege that the appellees were the owners of the land at the time suit was commenced, but no authorities are cited in support of this contention. It alleges the ownership of the land at the time of the conveyance of the forty acres and the right of way to the appellant the Hoosier Stone Company, and the conveyance of the same to the company; that the same was granted for the purpose of permitting said company to convey the products of their stone quarry on said forty acres to the railroad, and for no other purpose; the subletting of the same to the other appellants, and denies the right of the company to sublease the same. We think the complaint sufficient to withstand a demurrer.

The next alleged error complained of is the sustaining of appellees' demurrer to the second paragraph of appellants' answer. The first paragraph is a general denial. The second paragraph alleges that the appellant the Hoosier Stone Company holds title to said way by warranty deed from the appellees and William E. Malott, and the use of the way by the other appellants is by its authority and by virtue of the stone company's right to the way. This presents the

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principal question in the case, as to what rights the stone company acquired by the conveyance of the way, and what it may be used for and by whom. The complaint sets out the conveyance, and the answer alleges the conveyance, and claims a right on the part of the company to use the way itself, and to authorize a general use of it by others to convey the products of their stone quarries upon other lands than the forty acres so conveyed to the stone company. Private ways are either appendant or in gross. Ways appendant are incident to an estate; they inhere in the land, concern the premises, and pertain to its enjoyment, and pass with the land. Ways in gross attach to and vest the right in the person to whom granted. *Alley v. Carleton*, 94 Am. Dec. 260; *Davidson v. Nicholson*, 59 Ind. 411; *Moore v. Crose*, 43 Ind. 30; *Sanxay v. Hunger*, 42 Ind. 44; *Fankboner v. Corder*, 127 Ind. 164; *Harding v. Cowgar*, 127 Ind. 245. Ways in gross can not be assigned or granted to another.

The conveyance in this case by warranty deed conveyed the forty acres of land, and with it designated also a right of way for a railway switch across other lands to the Louisville, New Albany and Chicago Railroad. No separate consideration was stipulated for the way. The consideration for the forty acres and the way was in gross. It constituted a grant of the forty acres and a way across the other land from such tract to the railroad. It was a grant of a way appendant, and is incident to the estate of the company in the forty acres. It inheres in the land, and concerns the premises, and pertains to the enjoyment of the same.

It is held that where land is granted with a right of way, that right is appurtenant to every part of the land thereafter granted. *Watson v. Bioren*, 7 Am. Dec. 617.

The way is granted for the benefit of the particular land, and its use is limited to use in connection with the enjoyment of such land. Such a way can not be converted into a public way without the consent of the grantors, and the grantors have the right to rely on its use being limited to the purpose

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for which it is granted ; or, in other words, its legal use, and can prevent the use of the way for purposes not authorized.

If, as contended by the appellants, the Hoosier Stone Company has the right to sublease or to permit the use of it by its co-appellants for the transportation of the products of their stone quarry situate upon other lands, it may extend such use to others, or permit its use for general public traffic. This would be entirely inconsistent with the rule of law governing the use of private ways.

The appellants also contend the court erred in sustaining the appellees' demurrer to the third paragraph of appellants' answer.

This paragraph attempts to plead an estoppel, by alleging that the sublessees had expended a large sum of money in constructing and extending the switch from its *terminus* on the lands of the Hoosier Stone Company to their quarry on adjacent lands, and that the appellees had knowledge of the doing of the work and expending of the money, and alleges that the stone company at the time had a warranty deed for the way, and had taken possession of the same under the deed. The construction of the switch across the way over the forty-acre tract owned by the stone company was proper use of it. The appellees had no right to stop or interfere with its construction. It is not shown that they did any act, or in any way authorized the construction of the same beyond and over the lands of the other appellants ; and, indeed, appellees had no right to interfere with its construction if they had knowledge of it.

The appellants show by the averments of the answer that they had knowledge of the warranty deed to the stone company, and they were bound to take knowledge of the legal effect of the same, and the rights of the stone company under it. The facts pleaded fall far short of a good plea in estoppel. *First Nat'l Bank v. Williams*, 126 Ind. 423.

The only remaining question presented arises on the exceptions to the conclusions of law, but what we have said in

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passing upon the question presented by the ruling on the demurrer to the second paragraph of answer fully disposes of the questions presented by the exceptions to the conclusions of law, for if the appellant the Hoosier Stone Company had no right to sublet and authorize the use of the way by adjacent land-owners to transport the stone from their quarries, then the conclusions of law stated by the court are correct.

There is no error in the record.

Judgment affirmed, with costs.

Filed Dec. 10, 1891.

No. 16,079.

VANDYNE v. THE STATE.

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130	26
171	102

NEW TRIAL.—*Newly-Discovered Evidence.*—*Affidavit of Witness Must be Produced.*—*Defendant in Custody no Excuse.*—On a motion for a new trial because of newly-discovered evidence, the affidavit of the witness who will testify as alleged must be produced, and it is no excuse that the party moving for the new trial is in custody.

JUDGMENT.—*Arrest of.*—The fact that the number on the indictment and the number of the cause are different is not sufficient to authorize the arrest of the judgment, if the record show that all the proceedings subsequent to the return made by the grand jury were had on the indictment thus returned.

From the Wabash Circuit Court.

C. E. Cowgill, H. B. Shively and H. C. Pettit, for appellant.

A. G. Smith, Attorney General, for the State.

COFFEY, J.—This was a prosecution by the State against the appellant on a charge of petit larceny. A trial by jury resulted in a verdict finding the defendant guilty as charged, upon which the court, over a motion for a new trial, rendered judgment.

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Two errors are assigned :

First. That the court erred in overruling the appellant's motion for a new trial ; and,

Second. That the court erred in overruling the appellant's motion in arrest of judgment.

The only matter relied upon for a new trial was newly-discovered evidence. The motion was supported by the affidavit of the appellant alone ; no affidavits of the witnesses whose evidence had been discovered being filed, and no excuse for not filing them given.

There was no error in overruling the motion.

Shipman v. State, 38 Ind. 549 ; *Quinn v. State*, 128 Ind. 59.

In the latter case cited it was said by this court : " It is well settled that the affidavit of the witness, which the party alleges he has discovered, must be filed." The fact that the defendant is in custody is no excuse for not filing such affidavits, as they may be procured without his personal attendance.

The motion in arrest of judgment is based upon the fact that the indictment when returned was numbered 654, while the subsequent proceedings were had in a cause numbered 853. It is contended by the appellant that it does not, for this reason, appear that the grand jury returned an indictment against him into open court.

The case of *Mergentheim v. State*, 107 Ind. 567, seems to be decisive of the question here presented. In that case this court said : " That the number on the indictment and the number of the cause were different, is immaterial."

The record in this case contains the indictment returned by the grand jury numbered 654. When docketed the cause seems to have been numbered 853, but the evidence in the cause, as well as all the proceedings subsequent to the return made by the grand jury, shows that such proceedings were had on the indictment before us.

There is no error in the record.

Judgment affirmed.

Filed Dec. 9, 1891.

Teeter v. Newcom.

No. 15,440.

TEETER v. NEWCOM.

MARRIED WOMAN.—Insane Husband.—Conveyance of Separate Property.—By the act of March 11th, 1861 (1 R. S. 1876, p. 555), a married woman whose husband is insane may make a valid deed of conveyance of her separate property.

From the Wayne Circuit Court.

B. F. Mason and *T. J. Study*, for appellant.

J. F. Kibbey, *H. C. Fox* and *J. F. Robbins*, for appellee.

MILLER, J.—One Rebecca Halderman, who was the owner, in her own right, of a tract of land, sold for its full value and conveyed the land by a general warranty deed to the appellee, her husband not joining in the deed.

At the time of the conveyance her husband was insane, and so remained until his death.

After the death of the husband, his widow conveyed the land to the appellant, her daughter, who brings this action to recover the land.

If the conveyance made by Rebecca Halderman to the appellee, her husband not joining, was a valid conveyance, her subsequent grantee acquired no title, and can not recover the land.

Rebecca Halderman being a married woman, her conveyance to the appellee was absolutely void, unless some enabling statute authorized her to convey, without her husband joining in the conveyance. *Shumaker v. Johnson*, 35 Ind. 33; *Behler v. Weyburn*, 59 Ind. 143; *Suman v. Springate*, 67 Ind. 115.

The solution of this question depends upon the construction to be given to an act of the General Assembly, then in force, which is as follows:

“An act to enlarge the legal capacity of married woman whose husbands are insane, and to enable them to contract as if they were unmarried.” Approved March 11th, 1861.

Teeter v. Newcom.

"Section 1. Be it enacted by the General Assembly of the State of Indiana, That all married women, or those who may be hereafter married, whose husbands are, or may be insane, are during the continuance of such insanity, hereby enabled and authorized to make and execute all such contracts, and to be contracted with, in relation to their separate property, as they could if they were unmarried, and they may sue and be sued thereon as if they were *sole*."

The question we are to determine is this: Is the making of a deed of conveyance for her separate property one of the contracts which this act authorizes a married woman to make?

In *Shin v. Bosart*, 72 Ind. 105, it was held that this act enabled a married woman whose husband was insane to execute a mortgage on her separate real estate without being joined by her husband. In the opinion this language is used:

"The object intended to be accomplished by the statute is obvious, and the wisdom of such an enactment very manifest. The reason the law has always required that married women should only contract with the consent of, and in conjunction with, the husband, is, that the advice, experience and business knowledge of the latter should be used for the benefit of the wife, and to prevent her from being drawn into contracts prejudicial to her interests. This reason can not apply where the reasoning powers of the husband are overthrown by disease, and where, so far from being capable of giving advice, he is incapable of thinking natural thoughts."

This reasoning applies with as much force to the making of a deed as a mortgage.

We are unable to conceive of any good reason why the law-making power should have given married women, whose husbands were insane, power to encumber or make contracts that might result in the alienation of their separate property, and yet withhold from them power to make such alienation by a direct and inexpensive method.

Nothing, either in the reason for the enactment of the

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law, or in the language used in the act, indicates an intention to make this discrimination. A deed of conveyance is as much a contract in relation to their separate property as a mortgage of the same.

The language used both in the title and in the body of the act, indicates an intention, so far as their separate property is concerned, to entirely remove their disabilities, and enable them to contract as fully as if they were unmarried.

We are unable to agree with counsel in the position assumed by them, that this act simply permitted married women, whose husbands were insane, to make contracts for the improvement of their separate property, or to encumber it when necessary for its use and enjoyment. We find no words of limitation in the act restricting their power to contract generally and for all purposes.

It is also contended that the General Assembly, in the enactment of the act approved April 9, 1881 (section 5138, R. S. 1881), indicated that it did not construe the act of 1861 as giving power to married women to convey the fee simple. A construction placed upon an act by a Legislature convening twenty years after its enactment would not be of controlling weight. *Middleton v. Greeson*, 106 Ind. 18 (28). But we do not regard this as a legislative construction, but as a simple change of the law upon the subject.

The construction placed upon this act by the circuit court seems to be in harmony with the letter of the act, and such as to promote the object of its enactment, although it may prevent the appellant and her grantor recovering the land while retaining the price for which it was sold.

Judgment affirmed.

Filed Dec. 8, 1891.

 Sheeks v. Erwin et al.

No. 15,278.

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PLEADING.—*Vagueness.*—*Uncertainty.*—*Demurrer.*—Vagueness and uncertainty in a pleading are not reached by demurrer. The remedy is by motion to make the pleading more certain or specific.

INJUNCTION.—*Right of Way, Obstruction of.*—*Damages.*—Where a right of way has been claimed and used for over twenty years, without interruption or dispute, it can not be closed against the person acquiring such right by prescription. An action for damages would not afford adequate relief, and injunction is the proper remedy to prevent an obstruction of it.

From the Lawrence Circuit Court.

N. Grooke and *J. H. Willard*, for appellant.

M. F. Dunn and *G. G. Dunn*, for appellee.

COFFEY, J.—This was an action by the appellees against the appellant, in the Lawrence Circuit Court, to enjoin the latter from obstructing an alleged private way. The complaint consists of three paragraphs.

The first paragraph proceeds upon the theory that the way in question is a public highway in which the appellees have a special interest as a means of ingress and egress to and from their lands described in the complaint.

The second paragraph proceeds upon the assumption that the appellees are entitled to the way by prescription.

The third paragraph alleges facts showing a right of way to certain of the lands belonging to the appellees by prescription, to certain other of their land a right of way of necessity, and contains allegations tending to show that the appellant is estopped from denying the existence of such right of way.

Various objections are urged against the sufficiency of the several paragraphs of this complaint, but they principally relate to the vagueness and uncertainty of its allegations. This defect is not reached by demurrer. The remedy for

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uncertainty is by motion to make the pleading more specific or certain. No such motion was interposed in this case.

We think each paragraph states facts sufficient to entitle the appellees to an injunction against the appellant. An action for damages in a case like this would not afford an adequate remedy.

Upon proper request the court made a special finding of the facts proven on the trial, and stated its conclusions of law thereon.

The conclusions of law as to the appellee Lewis were adverse to him, and, as no question is made here as to the correctness of this conclusion, the facts, as they relate to him, need not be stated.

As to the appellee Erwin, the court found, among other facts, that the appellant is the owner of the land over which the way in dispute passes; that Erwin is the owner of certain other land described in the complaint, having inherited the same from William Erwin, Sr., who owned it in the year 1832; and that the appellee Erwin has used and enjoyed continuously and uninterruptedly the right of way in dispute adversely to the appellant as a means of ingress and egress to and from the lands so owned by him for more than thirty years.

These facts are sufficient to show that the appellee Erwin has a private right of way over the lands of the appellant by prescription. *Hill v. Hagaman*, 84 Ind. 287; *Parish v. Kaspere*, 109 Ind. 586; *Harding v. Cowgar*, 127 Ind. 245; *Fankboner v. Corder*, 127 Ind. 164.

In the last case cited it was said by this court: "If there has been the use of an easement for twenty years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained."

But in this case there is an express finding that the use of the way in question by the appellant was had for thirty

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years adversely to the appellant. Such being the fact the appellant could not close the same without the consent of the appellee, and injunction was the proper remedy to prevent its obstruction.

The court did not err in its conclusions of law.

Judgment affirmed.

Filed Nov. 23, 1891.

No. 15,042.

MCAFEE V. REYNOLDS.

EQUITY.—*Injunction.*—*Inadequate Remedy.*—If there is an inadequate remedy at law, equity will assume jurisdiction.

ACTION.—The lapse of time between the bringing of a suit and the rendition of a decision therein can not defeat the plaintiff, if he has not been guilty of laches in the prosecution of the cause of action.

JUDGMENT.—*Lien.*—*Right to Maintain Action to Assert Superiority of.*—The owner of a judgment which is a lien upon real estate may bring an action to have his lien declared prior to and free from a claim asserted to be superior to it.

SAME.—*Lien.*—*How Given.*—*Extending.*—The lien of a judgment is given by statute, and can not be prolonged by the court beyond the time fixed by the statute.

SAME.—*Action to Enforce Lien of.*—*Expiration of Lien Pending Suit, Effect.*—*Costs.*—A judgment lien can not be enforced against an inferior lien after the former has expired, although the action for that purpose was brought on such judgment before it expired, such lien having expired during the pendency of the suit. In such an instance the plaintiff is entitled to recover costs up to the time of the decision of the court.

PRACTICE.—*Supreme Court.*—*Reversal.*—*When will Direct Lower Court to Enter Judgment.*—Where the facts are not in dispute, all the material matters appearing upon the face of the record, and such record enables the appellate court to ascertain and declare the justice of the cause, that court will direct the lower court what judgment to enter, and not remand the cause for a new trial.

From the White Circuit Court.

R. P. Davidson, for appellant.

J. H. Adams and J. B. Sherwood, for appellee.

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ELLIOTT, J.—On the 19th day of June, 1877, Robert J. Brown was the owner of the real estate involved in this controversy, and on that day Earhart and others obtained judgment against him. This judgment became a lien upon the real estate, and has never been paid or satisfied. Brown died on the 6th day of November, 1877. By proper assignments the appellee became the owner of the judgment. James M. Brown was appointed the administrator of the estate of Robert J. Brown, deceased, on the 3d day of December, 1877, and on the 30th day of July, 1878, petitioned for an order to sell the land to pay the debts of his intestate. Joseph Kious became the successor of James M. Brown, and filed a supplemental petition for an order for the sale of the property, and an order was made as prayed. Neither the appellee nor any other lien-holder was a party to the proceedings, except in so far as the notice given by publication made under the law then in force may have constituted them parties. The real estate was sold pursuant to the order to the appellant on the 1st day of October, 1877, the purchase-money was paid by him, and a deed was executed and approved. Under this deed the grantee entered into possession. The estate of Robert J. Brown was insolvent. The only mention of liens in the proceedings on the petition was made in the decree approving and confirming the deed executed by the administrator, and the mention there made is not of the judgment of the appellee, but of a judgment owned by John P. Carr.

The present action was begun on the 24th day of February, 1888.

The conclusions of law stated by the court read thus :

“1st. The rights of the plaintiff must be determined as they existed at the commencement of this suit. The fact that ten years, exclusive of the time the plaintiff was restrained from prosecuting her remedy upon the judgment by the death of the judgment defendant, has expired since the commencement of this suit is no bar to his right to recover.

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"2d. The sale of the land by the administrator was made to the defendant subject to the lien of the plaintiff's judgment. So much of the decree confirming the deed to the defendant as adjudged that he take the land free of liens and encumbrances is void as to the plaintiff. There is nothing in the petition to sell, the appraisal, the order of sale, or the report of sale that authorizes any such decree.

"3d. The plaintiff is entitled to the relief prayed for in his complaint, with costs."

It is obvious that the right of the plaintiff created by her judgment was not divested by the decree directing the sale of the lands, nor is it contended by appellant's counsel that the lien was extinguished. It is also evident that the time the hands of the judgment creditor were tied by the statutory provision restraining proceedings to enforce a judgment for the period of one year after the death of the debtor can not be justly considered in computing the time during which the lien continues in force. *Jones v. Detchon*, 91 Ind. 154. This we understand is conceded by appellant's counsel.

The contention of appellant's counsel is, in effect, that the lien of the judgment having expired on the 4th day of July, 1888, after that time no decree could be rendered declaratory of its existence and providing for its enforcement. The appellee's counsel assert that "The question is not whether the lien of a judgment upon real estate may be prolonged beyond the statutory period fixed for such liens, but whether the rights and liens existing and held by the plaintiff at the time of bringing suit shall be adjudged and enforced as of the date of the commencement of the action." This statement of the respective positions of counsel exhibits the principal question in the case.

The land had passed into the hands of a third person, the purchaser at the administrator's sale, and hence the judgment creditor had a right to bring a suit to have his lien declared and freed from the claim asserted by the purchaser

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under the administrator's deed. *Decker v. Gilbert*, 80 Ind. 107; *Faulkner v. Larrabee*, 76 Ind. 154.

The claim of the appellant was an obstruction to the enforcement of the judgment lien, and the creditor had a right to ask that the obstruction be removed so as to enable her to realize the benefit of her judgment. *Quarl v. Abbett*, 102 Ind. 233. Under the old procedure *scire facias* was the appropriate procedure where the rights of a third person intervened. 1 Freeman Executions, 81. But, where such a proceeding would not give adequate relief, the assistance of equity was properly invoked. In such a case as this, it is evident that a mere motion for leave to issue an execution would not secure adequate relief, since a sale upon execution would still leave the claim of the appellant undetermined, so that if it were conceded that the remedy by motion exists where the rights of a third person, based upon a claim of title created by a decree in judicial proceedings, have intervened, and where the judgment has died, still that remedy would not be adequate, inasmuch as the order would not fully remove the obstruction created by the sale under the decree. The rule is that where there is some remedy at law, but not an adequate one,—that is, one that will adjudicate the entire controversy and grant full relief,—equity will assume jurisdiction. *Watson v. Sutherland*, 5 Wall. 74; *Denny v. Denny*, 113 Ind. 22; *Bishop v. Moorman*, 98 Ind. 1, and authorities cited. Whatever view is taken of the case, the result is that the conclusion must be that the suit is an appropriate one, and there was no mistake in electing the remedy.

What we have said establishes the initial proposition involved, inasmuch as it proves that the plaintiff stated a cause of action when she began her suit. If she is to be entirely defeated, it must be for the reason that the efflux of time has destroyed her right.

Ordinarily, a plaintiff will succeed if at the time he sues a complete cause of action exists in him. This is a general rule to which there are few exceptions. The cases wherein

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the plaintiff by his own act divests himself of a right of action constitute the most numerous class of exceptions, but there is here no element which makes that class of cases even remotely analogous, since no act was done by the plaintiff after suit which released or impaired her rights. If the right of action which existed in the plaintiff when she began her action has been destroyed, it must be because the law so operates as to take it from her. There is no express enactment divesting the cause of action, and no event has occurred changing the position of the parties. The only thing that can be said to have affected the case in any way is the lapse of time. If this can be assigned a retrospective effect, then there is plausibility in the contention that the right of action was wholly swept away; if not, then the contention is foundationless.

If the lapse of time, without any fault of a plaintiff, or any act of his, can destroy a cause of action, then it is in the power of a defendant, by prolonging litigation, to destroy a meritorious cause of action, and this is a result not to be reached without strong and cogent reasons. If a cause of action exists when a suit is begun, the plaintiff has a substantive right, and where there is a right there is a remedy. Where there is a right and a corresponding remedy, and steps have been taken to vindicate the right, a plaintiff has done all that the law requires of him, and he can not be turned out of court, because delay, attributable to no fault of his, renders the right asserted by him ineffective. It seems clear to us on principle that the appellee did not lose her cause of action because of the lapse of time, and that the time which intervened between the bringing of the suit and the decision can not so operate as to defeat her suit. What its effect is upon the measure of relief is quite another question, and one that will be considered further on. It may, however, be here said appropriately that the right to sue is one thing and the quantity, or degree of relief, quite another thing.

The difficult question here is not as to the existence of a

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cause of action at the time the complaint was filed, but the difficult question is as to the measure of relief the plaintiff was entitled to at the time the decree was entered. The difficulty is created by the fact, for fact it is, that at the time the decree was pronounced the judgment of the plaintiff had ceased to have any force as a lien.

The proposition of appellant that the lien of a judgment as fixed by the statute can not be prolonged by the courts is indisputably correct. *Wells v. Bower*, 126 Ind. 115; *Shanklin v. Sims*, 110 Ind. 143; *Brown v. Wuskoff*, 118 Ind. 569; *Applegate v. Edwards*, 45 Ind. 329; *Albee v. Curtis*, 77 Iowa, 644; *Hutcheson v. Grubbs*, 80 Va. 251; *Boyle v. Maroney*, 73 Iowa, 70; *Spencer v. Haug*, 45 Minn. 231; *Newell v. Dart*, 28 Minn. 248.

A judgment lien is the creature of statute, owing its life and force entirely to legislation. It has, indeed, been said that a judgment is a charge on land, but not, in strictness, a lien. *Shirk v. Thomas*, 121 Ind. 147; *Johnson v. Hess*, 126 Ind. 298 (311); *Brunsdon v. Allard*, 2 E. & E. 17; *Ex parte Foster*, 2 Story, 131.

A party who secures a judgment obtains such a charge upon land as the statute gives and nothing more, for it is clear that he can acquire only what the statute creating the right vests in him. Our statute declares that the lien shall continue for ten years, and "no longer," thus definitely and positively limiting the duration of the lien. As no court is above the law, and as all courts must enforce the law as it is written, it necessarily results that a lien, created and limited by statute, can not be extended beyond the period fixed by the law-makers.

A party may forfeit a right to have a lien declared and established, and yet have no right to a decree extending its life beyond the statutory period. It is this right which the appellee possessed when she began her suit, and not a right to have a new lien created, nor an existing one prolonged beyond the limit fixed by law. Courts can not create a

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judgment lien on land, nor can they fix its duration, since that is the prerogative of the Legislature. No authority for making a judgment a lien on land, or for designating its incidents, can be found in the common law, since at common law a judgment was not a general lien upon that species of property. There was, it is true, a right to make a judgment available to a limited extent, but, as said by Marshall, C. J., in the case of *United States v. Morrison*, 4 Peters, 124: "The lien is the consequence of a right to take out an *elegit*."

We are satisfied that the trial court did not err in adjudging that the appellee had a right of action at the time his suit was commenced, but we can not escape the conclusion that it erred in holding that she was entitled to a decree ordering the land sold, and placing the lien above the title of the appellant. This was erroneous, for the reason that it assumed to give vitality to a lien which, by positive and inexorable law, was lifeless. The conclusions of law, and the decretal orders based on them, show that the trial court affirmed that the appellee had a right to have the land sold to discharge the statutory lien, and that the only right of the appellant was to the surplus remaining after the satisfaction of the judgment. The theory of the court that the lien could be prolonged directly or indirectly was erroneous, for when the lien perished by operation of law it could not be revived, nor could a new lien be created. The utmost that the appellee was entitled to was, as we have shown, a decree declaring that when her suit was brought she had a lien paramount to the title of the appellant. When the court went beyond this it erred, inasmuch as in so doing it prolonged the lien beyond the time of its legal life.

The record fully enables us to ascertain and declare the justice of the case, and hence it is our right and our duty to render such a judgment as will secure to each party his just rights. This is a general power resident in all high appellate tribunals, and it has been often exercised in cases, such as this, where the facts are not in dispute, and all the ma-

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terial matters appear upon the face of the record. *Parker v. Hubble*, 75 Ind. 580; *Buchanan v. Milligan*, 108 Ind. 433; *Western Union Tel. Co. v. Brown*, 108 Ind. 538 (544); *Bartholomew v. Pierson*, 112 Ind. 430; *Brown v. Jones*, 113 Ind. 46, and cases cited p. 50; *Sinker, Davis & Co. v. Green*, 113 Ind. 264; *Murdock v. Cox*, 118 Ind. 266; *Security Co. v. Arbuckle*, 119 Ind. 69; *Louisville, etc., R. R. Co. v. Etzler*, 119 Ind. 39 (44); *Roberts v. Lindley*, 121 Ind. 56, and cases cited p. 59; *Lapham v. Dreisvogt*, 36 Mo. App. 275; *Duck v. Peeler*, 74 Texas, 268; *Clark v. Sonnenschein*, L. R. 25 Q. B. Div. 226; *Luthe v. Luthe*, 12 Colo. 421; *Athens, etc., Works v. Bain*, 77 Ga. 72; *McKenzie v. Peck*, 74 Wis. 208.

The power, as the authorities declare, is one that should be freely exercised where its exercise will put an end to litigation, and yield justice. To accomplish this it is always proper to so mold the form of the mandate as that the trial court may carry into effect, by the appropriate record entries, the judgment of the appellate tribunal.

The mandate of this court is that the judgment of the trial court be in part affirmed and in part reversed; that the costs of the case in the court below up to the entry of the special finding be taxed against the appellant; that subsequent costs in that court be taxed in equal proportion against the respective parties; that the costs in this court be divided and taxed in like manner; and that the case be remanded, with instructions to enter a decree in accordance with this opinion, by eliminating so much of the decree as adjudges a sale of the land, prolongs the lien, and limits the right of the appellant to the surplus, and by entering the proper judgment for costs against the respective parties as herein indicated.

Filed Sept. 23, 1891; petition for a rehearing overruled Dec. 8, 1891.

The John Shillito Company v. McConnell et al.

No. 15,742.

THE JOHN SHILLITO COMPANY v. MCCONNELL ET AL.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Preferring Creditor, Can Not be Done in Deed of Assignment.*—A debtor in failing circumstances may prefer certain of his creditors to the exclusion of his other creditors; but such preferences can not be made as a part of the general assignment under the statute for the benefit of all his creditors.

SAME.—*Preference.*—*Knowledge of Insolvency.*—*Preference After Beginning Preparation for Assignment.*—A debtor, with a knowledge of his insolvency, and in contemplation of a general assignment, may preface such an assignment by executing to any of his creditors a mortgage upon his property to secure their claim; but where he has entered upon the performance of any formalities necessary to make an assignment under the statute for the benefit of all his creditors, he can not thereafter make any valid preference if he perseveres in and completes the assignment thus begun.

MORTGAGE.—*Execution Includes Delivery and Acceptance.*—The execution of a mortgage includes its delivery to and acceptance by the mortgagee.

SAME.—*Recording as Evidence of Execution.*—The record of a mortgage is *prima facie* evidence of its prior execution, but it is not conclusive, and it may be shown that, although recorded on a certain date, it was not delivered until afterward.

From the Dearborn Circuit Court.

D. H. Stapp and D. D. Woodmansee, for appellant.

H. D. McMullen, W. R. Johnston, H. R. McMullen, G. E. Downey and A. Zollars, for appellees.

MCBRIDE, J.—The appellee Robert A. McConnell was a merchant, and appellant is his creditor. McConnell, being in failing circumstances, to prefer certain of his creditors executed to them a mortgage on his property, and, also, made a general assignment of his property for the benefit of his creditors, under section 2662, R. S. 1881. Thomas W. Sargent, one of the appellees, is the assignee, and the remaining appellees are the preferred creditors.

Appellant brought this suit to set aside the mortgage as fraudulent and void, making the debtor, the assignee, and the

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preferred creditors defendants. The only question in the record is, whether or not the mortgage is void. This question was raised by a demurrer, which the court sustained to the first, third and fourth paragraphs of the complaint. The ground upon which appellant insists that the mortgage is void is, that it was executed contemporaneously with and as a part of the deed of assignment. If the facts pleaded show this to be true, the mortgage is invalid as to the unpreferred creditors, and the court erred in sustaining the demurrer. The law is too well settled to require the citation of authorities that a debtor in failing circumstances may prefer certain of his creditors to the exclusion of others.

Such a preference, however, can not be made as a part of a general assignment under the statute for the benefit of all his creditors. *Grubbs v. Morris*, 103 Ind. 166; *Henderson v. Pierce*, 108 Ind. 462.

While an insolvent debtor can not, as a part of a general assignment prefer creditors, he may, with knowledge of his insolvency, and in contemplation of a general assignment, preface such assignment by a preference of certain of his creditors. Nor is it material how long or how short the time which intervenes between the execution of the preference and the making of the assignment. It is enough if there is a *bona fide* preference of *bona fide* creditors, which, in fact, precedes the making of the general assignment. So long as a man retains dominion over his property he may make such honest preference, and as an assignment of that character has no retroactive effect except upon property fraudulently conveyed, or preferences fraudulently made, he may make such preference at any time before the assignment is made. *Gilbert v. McCorkle*, 110 Ind. 215; *Carnahan v. Schwab*, 127 Ind. 507.

The *bona fides* of such transaction is, of course, always open to inquiry. It is always competent to inquire if the debt purporting to be secured is a *bona fide* debt; whether or not the transaction, while ostensibly to secure a debt of the insol-

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vent, is not, in fact, a collusive attempt by the debtor and a pretended creditor to withhold the debtor's property from the operation of the assignment for the debtor's benefit, etc. We think that in the investigation of all such questions the length of time elapsing between the execution of the preference and the making of the assignment may properly be considered in connection with the other circumstances of the transaction.

The question comes to us on the pleadings only, and is to be determined from the facts averred by the pleader. So far as material to the controversy in this court, the averments of the first paragraph are substantially as follows:

That on the 12th day of October, 1889, defendant McConnell was in embarrassed and failing circumstances, and he "then commenced making an assignment of his property; and the plaintiff says that on said date the said Robert A. McConnell, in violation of the law relative to assignments, conveyed, by way of mortgage, to certain of his creditors all his personal property and real estate." The names of the favored creditors, with the amounts of their respective claims, are then set out. It is then averred that all of said claims thus secured are for pre-existing debts, but that said secured creditors are not all of the *bona fide* creditors of said McConnell, but that plaintiff, and others not secured by said mortgage, are also his *bona fide* creditors, and that the secured claims will more than exhaust all said debtor's property. It is then averred that "*immediately after, and contemporaneous with the making of the mortgage conveyance above referred to, which is made a part of this paragraph of complaint, and marked 'Exhibit B,' the said Robert A. McConnell also executed a deed purporting to convey to the defendant Thomas W. Sargent, in trust, for the benefit of all his bona fide creditors, all his property, both personal and real. And the plaintiff says that, while said trust deed bears date October 14th, 1889, in truth and in fact it was made and executed contemporaneously with the mortgage conveyance above*

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referred to, a copy of which deed is filed herewith and made a part of this paragraph and marked 'Exhibit C.'" The paragraph concludes with a prayer that the mortgage and the deed of assignment be adjudged as parts of one transaction, and as together constituting the indenture of assignment, and for judgment accordingly.

The statements in this pleading are so contradictory that it is difficult, if not impossible, to determine what the pleader means.

It is said that on a certain date the debtor "commenced making an assignment." The alleged commencement of the assignment consisted, it is said, in making, in "violation of the law relative to assignments," a mortgage preferring certain of his creditors. We confess our inability to understand how an act, which was done in violation of the law relative to assignments, was at the same time an act done pursuant to that law, and the commencement of an assignment in accordance with its terms.

It is then said that "*immediately after and contemporaneous with*" the making of the mortgage the deed of assignment was made.

We are also unable to comprehend how one act may be at the same time "*after*" and "*contemporaneous*" with another act.

We assume that the learned counsel who drew the complaint used these terms inadvertently. In the haste of active practice such unintentional lapses of the pen may be made by the best attorneys.

Copies of the mortgage and deed are made parts of this pleading. Whether correctly so or not we need not decide; but the notary's certificate of acknowledgment to the mortgage shows its acknowledgment to have been October 12th, 1889. The deed was acknowledged October 14th, 1889. This paragraph fails to show, either by express averment or by "fair intendment," that the mortgage and deed of assignment were contemporaneous in their execution, or that they were

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so connected in any other way as to make them parts of one transaction, and the demurrer thereto was correctly sustained.

The third paragraph of the complaint, after alleging the making of the assignment on the 14th day of October, 1889, contains the following with reference to the making of the mortgage :

“ That at the time of executing the said assignment, and coterminously therewith, the said Robert A. McConnell mortgaged all his property, including all his merchandise in his store and his real estate, not even exempting from said mortgage the amount of property that would be allowed him as exempt by law, to secure,” etc., giving names of secured creditors, with the amounts of their claims.

The paragraph then proceeds : “ That said mortgagor caused said mortgage securing the aforesaid debts to be dated October 12th, 1889, and to be placed on record in recorder’s office on the same date, which was Saturday, and caused the deed of assignment to be dated October 14th, 1889, the Monday following. That said two instruments were made contemporaneously with each other, and that said mortgage covered all the debtor’s property, and was to secure sums largely in excess of the fair cash value of all the property then owned by the debtor.”

It is also averred that the debts thus secured were pre-existing debts, and that “ said mortgage was recorded, on the 12th day of October, 1889, immediately after its execution, in the recorder’s office of Dearborn county,” etc.

In this paragraph it is expressly averred that the making of the mortgage and the deed of assignment were contemporaneous acts.

This averment is not weakened or qualified by the statement that the mortgagor caused the mortgage to be dated October 12th, and recorded on that day, while the deed of assignment was not made until October 14th. The para-

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graph charges the simultaneous *execution* of the two instruments.

The fact that a mortgage is placed on record on a certain date affords *prima facie* proof of its execution on or before that day. *Mallett v. Page*, 8 Ind. 364; *Somers v. Pumphrey*, 24 Ind. 231.

The execution of a mortgage includes its delivery to and acceptance by the mortgagee.

Delivery is as essential a part of the execution of a mortgage as signing it, and, while the record of a mortgage is *prima facie* evidence of its prior execution, it is not conclusive, and it may be shown that, although recorded at a certain date, it was not delivered until afterward.

In this pleading it is averred that causing it to be recorded on that date was the act of the mortgagor, and that the two instruments were in fact made contemporaneously with each other. This necessarily means that they were executed at the same time, which might be true if the mortgage, although recorded on the 12th day of October, was not delivered until the 14th of October.

The only averment in this paragraph apparently in conflict with the express statement that the two instruments were executed at the same time, is the statement above referred to, that the "mortgage was recorded on the 12th day of October, 1889, immediately after its *execution*," etc. If the word "*execution*," as here used, is to be given its technical signification, and if this is to be treated as an averment that the mortgage was fully executed before it was recorded, the averments in this paragraph, like those in the first, are contradictory of each other.

A mortgage which was recorded on the 12th day of October, and was executed before it was recorded, was not executed contemporaneously with an instrument which was executed on the 14th day of October. We can not say, however, that this expression, in the connection and manner in which

it is used, can control the express and repeated averments that the two instruments were executed at the same time.

This paragraph, therefore, presents the question as to whether or not a debtor in failing circumstances, engaged in making a general assignment of his property for the benefit of all his creditors, can at the same time make valid preferences of certain of his creditors by mortgage or otherwise. That he can not make such preference by or in the deed of assignment itself, is, as we have shown, settled and correctly settled in this State. We think it equally clear that he can not in any other manner make a valid preference of a creditor, while he is engaged in the act of making such assignment, provided the assignment is consummated.

While it can not be said that the debtor has in fact surrendered dominion over his property until the assignment is complete, as from the purely voluntary nature of the transaction he may at any time before the final act change his mind and refuse to complete it; yet, being completed, we think it ought to be held to relate back to the time when it was actually commenced, and cover all intervening transactions. The act of making the assignment embraces the preparation and execution of the necessary instruments, and whether that takes a long or a short time, it certainly must all be treated as one continuous act. To say that the debtor's surrender of his absolute control over the disposition of his property is to be dated from the time he actually commences to make the assignment, is to give to the entire transaction the character of good faith, and make it, in fact, what it purports to be—an effort to secure to all his creditors that equal consideration contemplated by the statute. But to hold that while he is thus engaged he may at the same time successfully prefer favored creditors, is to hold that he may at one and the same time do two exactly contradictory acts. It is to hold that he may be engaged in making a voluntary assignment for the benefit of *all* his creditors, insuring the equal distribution of all his property among all

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of them, without preference, and also in securing to some of these creditors payment in full of their claims to the exclusion of others—something as difficult of accomplishment as the equestrian feat of riding two horses in opposite directions at the same time. This paragraph of the complaint charging, as it does, that the mortgage was made contemporaneously with the deed of assignment, we think the circuit court erred in sustaining the demurrer to it.

The fourth paragraph of complaint charges in substance that McConnell, being hopelessly insolvent, and having full knowledge of that fact, determined to make a general assignment of all his property for the benefit of his creditors, but desired at the same time to prefer certain of them; that he was advised by counsel that such preference could not be legally made in the deed of assignment, but that by making a mortgage to such creditors as he desired to prefer and placing it upon record prior to making the assignment, he could accomplish that purpose; that thereupon, on the 12th day of October, 1889, he executed the mortgage in controversy, which was recorded on the 14th day of October, 1889, and that on the 15th day of October, 1889, he carried into effect his design, and made an assignment, with all the formalities required by the statute.

It is averred that the mortgage was made for the purpose of evading the rule of law which will not allow preferences to be made in the deed of assignment, and after he had determined to dispose of all his assets by assignment for the benefit of all his creditors, and that the making of the mortgage was "part of a scheme to avoid the statute, and said mortgage aforesaid was made with that object in view, and that the same was part of a scheme to make an assignment, and for the sole purpose of defeating by the mortgage the provision of the law forbidding preferences in deeds of assignment."

Appellant insists that upon these facts the mortgage becomes a part of the deed of assignment, and that the

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court should go back to the time when the debtor determined to make an assignment and set aside all preferences thereafter made.

Our attention has been called to the case of *Preston v. Spaulding*, 120 Ill. 208, as sustaining this paragraph, and we are inclined to think it does sustain it. It is there held that after a debtor has made up his mind to make an assignment of his property for the benefit of creditors, all conveyances, transfers and other dispositions of his property or assets, made in view of his intended general assignment, whereby any preference is given, will in a court of equity be declared void, and set aside the same as though incorporated in the deed itself. The court says: "We hold that it is within the spirit and intent of the statute, that when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken,—the law will regard all his acts, having for their object and effect the disposition of his estate, as parts of a single transaction; and on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside, as in fraud of the statute."

We are not certain that we understand just what the court means by the expression "has entered upon that determination," but as we understand the opinion it is in direct conflict with the conclusion long since reached by this court and many times announced. While we have great respect for the opinions of the Supreme Court of Illinois, we regard

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the rule as stated in the opinion written by the late Judge Mitchell in *Gilbert v. McCorkle*, *supra*, and as stated in other opinions of similar tenor, as being correct on principle, and we are content to abide by it.

So long as the purposed assignment remains mere matter of intention, contemplation, or determination, the debtor has done nothing to abdicate the dominion which the law gives him over his property. He may be hopelessly insolvent for months, or indeed, as is averred in this complaint, he may be insolvent for more than a year before he makes the assignment. During all of that time he may know of such insolvency, and may contemplate making an assignment. Indeed he may fully reach the determination to make it, but defer the execution of that purpose from time to time, and when such purpose is finally consummated will it do to say that a court of equity will attempt to reach back and undo all preferences given since that determination took form in his mind? Many practical difficulties would beset the chancellor in attempting to apply such a rule. Reaching the determination to make the assignment is a mental process in the debtor's mind. How may the time be fixed when he thus determines? How far back would the chancellor go in his inquisition into the debtor's state of mind?

Certain formalities are necessary to consummate such a purpose, and we think it may fairly be said that when the debtor has once entered upon the doing of these formal acts necessary to make the assignment he can not thereafter make any valid preference if he perseveres and completes the assignment thus begun. This is as far, however, as the courts can safely go.

The circuit court did not err in sustaining the demurrer to this paragraph of the complaint. For the error committed in sustaining the demurrer to the third paragraph of the complaint the cause is reversed, with costs.

Filed Feb. 26, 1891; petition for a rehearing overruled Dec. 8, 1891.

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No. 16,298.

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PRACTICE.—*Reversing Case on the Evidence.*—If the evidence tends to support the verdict, the Supreme Court will not reverse the case, no matter how contradictory it may be when considered as a whole.

CRIMINAL LAW.—*Insufficiency of Evidence.*—*Case in Point.*—Insufficiency of evidence to sustain a conviction of manslaughter considered.

From the Jackson Circuit Court.

B. H. Burrell, F. L. Branaman and J. M. Lewis, for appellant.

W. T. Branaman, Prosecuting Attorney, and *A. G. Smith*, Attorney General, for the State.

MILLER, J.—The only question here is upon the sufficiency of the evidence to support the verdict. The appellant was indicted for the murder of Arthur E. Beadle. A trial by jury resulted in a verdict of manslaughter, fixing his punishment at ten years' imprisonment.

The appellant admitted the killing, but claimed that it was done in self-defence.

The evidence shows without dispute that the appellant and his wife, Cora, had been separated something over a year. The wife had possession of their child, an infant of less than two years of age, until about eight weeks prior to the tragedy, when the appellant took and kept it. On the night of the homicide the appellant took his child and his mother to a school-house, where religious services were being held. His wife, Cora, and her father, Luther Beadle, her brothers, Victor Beadle, and the deceased, Arthur E. Beadle, and other members of the family, were attendants at the services. The appellant sat with his child in the back part of the house, near the door. After the close of the services his wife went back to him and took hold of the child, when a scuffle ensued for its possession, in which he slapped or pushed his wife. A fight then ensued between the appellant and the three Bead-

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les, the father and two sons, during which one of them, a boy sixteen years old, was shot and killed.

The evidence for the prosecution as to the circumstances of the killing is in substance detailed in the following synopsis, copied, largely, from the brief of the attorney general:

Eva Donalds, the first witness for the State, testifies that after church the appellant's wife went up to him, and asked to see the baby. He told her to let it alone. She replied that she had as much right to see it as he had, and took hold of it, whereupon he struck her and called her a vulgar name. The deceased then came up and struck him, after which the crowd gathered and the witness saw no more. She saw them have appellant down on the floor, and deceased striking him. They were fighting from the time they commenced until the shot was fired. The baby was back where they were fighting, and the wife got it, and the witness helped her take it out through the window.

On cross-examination this witness testifies that when appellant's wife took hold of the baby's hand he struck her, and she said she had as much right to have the baby as he had, and she wanted it. He said he would not do it, and for her to let go of the baby; she did not do so, and he struck her a second time, but she still held on to the baby. The deceased then came up, and defendant said nothing to him, nor he to deceased. Then defendant jerked the baby away from his wife, and whirled around in the aisle, and started for the door, and the deceased and Luther Beadle (the father) followed him. The door was shut, and he then went into the corner, holding on to the baby. The defendant struck the deceased, and the deceased and his father struck the defendant. The baby was put on the desk, and the men were fighting. Witness saw the deceased hit the defendant one or two times just before she went out of the window. He was down on the floor, and the other men were on him.

Zachariah Marling testified that after church was dismissed the defendant had his baby in his arms; that just after

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church closed he saw Luther Beadle make a motion to defendant's wife, and whisper to her, and she started down the aisle to defendant, her father following her. Witness heard swearing, and a noise like some one was struck or kicked. The three Beadles were in front of the defendant, and they were fighting. They were crowded over in the southeast corner. Saw a revolver raised, as if some one was striking with it. The three Beadles were striking the defendant, but the witness could not see just what part the deceased was doing. The defendant struck deceased with a revolver, and deceased had defendant by the collar, and was hitting him. The three Beadles had defendant down on the floor, when the defendant put his revolver under his arm and fired. Deceased struck defendant once or twice after the shot was fired, and then went out followed by his father. The defendant followed to the door, where his revolver was taken away from him; that at the time the shot was fired the Beadles had the defendant down, the deceased was striking him, and Victor Beadle was upon him and striking him.

Jacob Myers testified that he heard the shot, and afterwards took the revolver away from the defendant, who said to him, "I will shoot the damn heart out of you if you don't let me go. They are all on me."

On cross-examination he says: "I was near the door when I heard the shot. I saw that it was the three Beadles and defendant that were fighting in the corner. They had defendant down on the floor."

James G. Allison testified that either in August or October the defendant said to him that he would "wipe out" three of the Beadles.

Isaac N. Collins testified to a threat made by the defendant, on Christmas eve, that he would put daylight through some of the Beadles if they were not careful.

Mattie Powell's evidence was to the effect that, after the close of the services, the defendant was putting on the child's wraps, when his wife came up and grabbed the child. He

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told her to let go of the child. She said she would not, and held on, and he slapped her. Then the three Beadles came up and commenced to fight the defendant, who took up the baby in his arms, and started for the door, and asked some one to open it. The door was opened by some one, and then closed. When he started for the door some one jerked him back, and they crowded him over in the corner, and were all fighting the defendant there, and had him down on the floor when the shot was fired. This witness also says that the defendant started to run out of the house, when the door was closed ; that he started fast.

Eliza Beadle testified that she saw the defendant's wife go to him, and said, "Samuel, let me see the baby," to which he replied, "No," when she took hold of the baby, whereupon he slapped her. This witness did not see much of the fight, but says the Beadles were all after him, and when they got back into the corner the wife followed them up.

William L. Ross says that he first knew of the trouble when he heard a woman scream. He then got upon a seat and saw the defendant and the three Beadles in the corner of the room. Defendant set the child down on a corner and commenced to knock the deceased. Deceased and his brother were knocking the defendant. They had knocked him against the wall, and then Luther Beadles, the father, ran in and struck defendant ; that at the time of the shot they were in the corner, the defendant on his knees and the others about him. The deceased was sixteen years old, tall and slender, and would weigh one hundred and ten pounds.

William W. Collins testified that he caught the defendant and held him while Myers took the revolver from him. Myers told defendant that he had killed one man and not to kill another, to which defendant replied, "Let me go ;" also, that the defendant struck at Sarah Beadle.

On cross-examination this witness says that he heard the defendant call for help, but that no one went to his rescue.

Luther Beadle, father of the deceased, testified that after

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the defendant came in with the baby, witness went to Cora and spoke to her, and that after church he made a sign to Cora, and she went to defendant and reached out her hand for the child, but defendant would not give her the child; that she grabbed it and he slapped her, and she held on to the child. He tried to get her loose from the child but could not, then he struck her two or three times, but she held to the child; that the deceased started from the other side of the room, and when he got close to the defendant he commenced pushing him back. "I and my eldest son went there. I saw defendant had a revolver. He presented it at my breast, and he tried the second time. I knocked it off. He then put the revolver under the deceased's clothes and shot. I was then with my two boys. When I left the stove to go to the defendant they were in the northeast corner of the room, about eight feet from where the defendant struck his wife. When I got to them the deceased had the defendant by the hair of the head and was pushing him against the wall. The baby was on the floor. Victor and I started for the defendant about the same time, and got there about the same time. There was quite a scuffle in the corner. When Arthur (the deceased) and defendant were fighting, Victor handed him one. I knocked him nearly down during the fight. He shot, and Arthur quit fighting, saying, "I am killed," and went out. I started to follow him, and defendant snapped his revolver at me. I struck him and staggered him back.

On cross-examination the witness says that he had a revolver that night, which was taken from him by Jacob Meyers.

Victor Beadle testifies that when the wife went to the defendant he hit her. Then deceased went up, put his hand on defendant and pushed him back, whereupon the defendant struck him. Saw defendant strike deceased once. They got into the southeast corner of the room, twelve or fourteen feet from where it commenced. When the shot was fired

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defendant was half bent over, and deceased had his head under his arm and was pounding him.

Sarah Beadle, mother of the deceased, testified that after church her daughter went to the defendant and asked to see the child. He slapped her. She took hold of the child and held on, and he hit her with his fist. His mother also hit her. The deceased went up and pushed defendant back, and defendant turned and hit him three times before he did anything. When defendant got out he ran down into the corner of the school-house. Cora took the child. Just before the shot was fired, Luther knocked the defendant down, and the deceased caught him by the back of the neck with one hand and was thumping him with the other.

Bertha Collins says that when the defendant's wife went to get the baby he slapped her, and commenced to run backwards with the baby. Witness ran out of the house, and when she came back she saw the defendant strike Luther Beadle with a revolver.

Cora Coryell, wife of the defendant, says: "I went to defendant and asked him to see the baby. He hit me with his open hand. He hit me three times before brother came up, and then Arthur struck him and the fight commenced. He pulled off my fascinator in the racket. I got the child from under them on the floor, in the northeast corner of the house, where they were fighting. When I got the child, defendant was bent over and my brothers were hitting him. I was about the middle window of the house when the shot was fired."

On cross-examination she says that the defendant tried to get out of the house, but could not. She also says: "I went to get the child and stayed until I got the child. Yes, I got it."

On re-examination she testified that during the fight in the corner of the room, the defendant asked one Robertson to take the child while he killed the whole damn set.

We have thus epitomized the evidence adduced by the

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State without reference to the exculpatory testimony introduced by the defendant. If the evidence introduced for the prosecution tends to support the verdict, it will be sufficient to sustain the conviction, no matter how contradictory the evidence may be, when considered as a whole.

The defendant is, however, entitled to the benefit of the uncontradicted testimony of his neighbors that his character in the neighborhood in which he resided was, and always had been, that of a peaceable, quiet and law-abiding citizen.

In our opinion, this evidence does not, even when viewed in the light least favorable to the defendant, sustain the verdict of the jury.

The action of the defendant in having upon his person a deadly weapon, carried in violation of law, and also his conduct in slapping or pushing his wife, particularly if she only asked to see their child, was most reprehensible, and at the outset placed the defendant in a position unfavorable to the maintenance of his defence.

The evidence, however, shows that he subsequently made an effort to withdraw himself from the conflict, and that from that time he acted on the defensive.

The evidence for the State shows that after his unsuccessful effort to leave the school-house, he was forced to abandon the possession of his child; was forced back into the corner of the room, and so set upon and assailed by the deceased and his father and brother that further retreat was impossible; that he was knocked or forced down on the floor and his cries for help unheeded; that after an unsuccessful effort to free himself from his assailants by using his pistol as a club, he fired the fatal shot, when down, with three men beating him.

While the jury were not compelled to, we think they might have inferred, from this evidence, that there was a pre-conceived attempt on the part of his wife and her father and brothers to take the child from the possession of the defend-

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ant, and that his wife did not simply ask to see the child, but demanded its possession, and took hold of it, and that the pushing or slapping was intended to free her hold without hurting the child. If such was the case, his conduct was much less reprehensible, for in order to keep from seriously injuring it, he was compelled to either surrender its possession or cause her by force to loosen her hold.

No questions of law are argued or involved, and a further discussion would be useless.

Judgment reversed, with instructions to grant the defendant a new trial.

Filed Dec. 12, 1891.

No. 15,382.

WILLIAMS v. THE STATE, EX REL. MOON.

APPELLATE COURT.—*Bastardy.*—*Jurisdiction.*—The Appellate Court has exclusive jurisdiction of a prosecution under the statute for bastardy.

From the Boone Circuit Court.

J. C. Suit, W. N. Suit and F. F. Moore, for appellant.

M. Bristow, C. M. Zion and W. R. Moore, for appellee.

OLDS, J.—This is a prosecution under the statute for bastardy. The object of such prosecution is to compel the father to maintain and educate the child, and this is secured by the rendition of a money judgment and an order requiring the father to pay to the mother, or such other person as the court may direct, such sums of money as the court may adjudge proper.

The ultimate judgment to be rendered is a money judgment.

The provision of the statute authorizing the commitment of the defendant to jail in default of replevin bail is intended to aid in securing the payment of the judgment. The sole object is to compel the payment of such a sum of money as

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the court may adjudge proper, and the action is an action for the recovery of money only, for if the judgment be paid or its payment secured by the entry of replevin bail, the object of the statute is accomplished, and no other relief is authorized. Sections 991 and 992, R. S. 1881.

Section 1 of the act creating the Appellate Court, and defining its jurisdiction (Acts of 1891, p. 39), provides that in "All cases for the recovery of money only where the amount in controversy does not exceed one thousand dollars," the Appellate Court shall have exclusive jurisdiction on appeal.

The judgment in this case is for four hundred dollars, and an appeal was taken, and the transcript filed in this court on the 7th day of February, 1891, and was pending in this court at the time of the passage of the act creating the Appellate Court.

Section 19 of said act provides for the transfer to that court of all cases then pending in this court of which the Appellate Court is by said act given jurisdiction.

The Appellate Court having exclusive jurisdiction in this class of cases, this case is transferred to the Appellate Court for decision.

Filed Nov. 20, 1891.

No. 15,216.

BRADFIELD, SHERIFF, ET AL. v. NEWBY ET AL.

JUDGMENT.—*Judgment Filed in Other County.—Duration of Lien.*—The lien of a judgment of a circuit court, filed in a county other than the one in which it was rendered, expires at the same time the lien expires in the county in which such judgment was rendered.

From the Hamilton Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellants.

T. J. Kane, T. P. Davis and W. Booth, for appellees.

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ELLIOTT, J.—On the 2d day of October, 1877, Nicholas Copple recovered a judgment in the Shelby Circuit Court against Jacob Cook. On the 11th of March, 1889, a transcript of the judgment was filed and docketed in the clerk's office of Hamilton county. An execution was issued on the judgment by order of the Shelby Circuit Court, on the 18th day of April, 1889, and the writ was received by the sheriff of Hamilton county on the 25th day of that month. Jacob Cook was the owner of land in Hamilton county on the 4th day of April, 1889, and on that day conveyed the land to the appellee Townson Newby. This suit was brought by Newby to restrain the sale of the land bought by him of the judgment debtor on the judgment obtained by Copple.

We are satisfied that the lien of the judgment expired before Newby became the owner of the land, and that the land could not be sold under it. The life of a judgment lien is fixed at ten years, and the courts can not prolong it. *Mahoney v. Neff*, 124 Ind. 380; *McAfee v. Reynolds*, *ante*, p. 33, and cases cited; *Brown v. Wuskoff*, 118 Ind. 569.

The statutory provision authorizing transcripts from one county to be docketed in another does not create a new lien. The utmost that can be claimed is that it transfers the lien from one county to another. The lien itself is unchanged, the foundation remains the same, and that foundation is the original judgment. When the life of that lien expires, all incidents perish with it. This is evident from the language of the statute authorizing the docketing of the transcripts of judgments in counties other than that in which the judgment was rendered. Section 611, R. S. 1881. The meaning of the statute plainly is that the filing of the transcript conveys the lien of the original judgment, but creates no new lien. The one judgment constitutes the lien from first to last. The words of the statute are: "Such judgment, from the time of filing the copy aforesaid, shall be a lien upon all the real estate, including chattels real, of the judgment debtor, situated in the county where filed, as fully

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as if such judgment had been rendered thereon." It seems quite clear to us that the duration of the lien is determined by the original judgment, and that the words "such judgment" refer to the only judgment ever rendered. If this be true, it must follow that there is only one judgment lien, and it is that lien that is transferred by the filing and docketing of the transcript. This conclusion, plain in itself, is required by the authorities to which we have referred.

Judgment affirmed.

Filed Oct. 8, 1891; petition for a rehearing overruled Dec. 10, 1891.

No. 15,247.

THE EVANSVILLE AND RICHMOND RAILROAD COMPANY
v. FETTIG.

130	61
157	426
157	431
130	61
170	497

PRACTICE.—Evidence.—Objection to, Particularity of.—Objections to evidence, to be available, must be reasonably specific; and it is not enough to state that it is "incompetent," "immaterial," or "improper."

EVIDENCE.—Proof of Value of Land.—Opinion by Witness Unacquainted with Value of Land in that Vicinity.—A witness, after stating the location of land and his knowledge of it, may give his opinion of its value, based upon such facts, without it being shown that he knew anything about the market value of lands in that vicinity.

SAME.—Proof of Value both Before and After Construction of Railroad.—In proving the value of land affected by the construction of a railroad, proof of its value, both before and after the construction of such road, may be made.

From the Jackson Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellant.

W. K. Marshall, for appellee.

MCBRIDE, J.—The only question argued by counsel for the appellant relates to the action of the trial court in admitting testimony.

The appellant sought to appropriate certain lands belong-

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ing to the appellee for the construction of its line of railroad. The assessment of damages being unsatisfactory to the appellee, he filed exceptions, and the cause was tried by the court, a jury being waived.

On the trial the appellee called several witnesses to testify to the value of the land before and after the construction of the railroad, and they were each allowed to testify over the objection of the appellant. With the exception of the first witness, the record does not show that any specific objection was made to the testimony of any of these witnesses.

With the majority of the witnesses the bill of exceptions simply shows, generally, that the appellant objected, and that, his objection being overruled, he excepted. In other instances it is stated that the objection was because the testimony was "incompetent and improper." Such objections present no question to this court. Objections to evidence, to be available, must be reasonably specific. It is not enough to state that the evidence is incompetent, or that it is "immaterial," or "improper," or "incompetent," but the particular objection must be fairly stated. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; *Farman v. Lauman*, 73 Ind. 568; *Nave v. Flack*, 90 Ind. 205; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551, and many other cases.

The testimony of all these witnesses was, however, substantially alike. The first witness called was Charles Leninger, who testified that he knew the land, and described its location, adjoining the corporation line of the city of Seymour, described its shape, testified that it was cleared and fenced, and that there were no buildings upon it. That it was "good to lay out in town lots," but had never been platted, and that the town was growing that way. He was then asked to state how much the land was worth per acre before the road was constructed. To this question the appellant at the time objected, for the reason "that it called for a mere opinion, and that the witness had not yet stated that he knew anything about the market value of lands, or

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of any lands selling in that immediate vicinity." The objection being overruled, an exception was properly saved.

There was no error in this ruling. The witness having testified to a knowledge of the very property in controversy, was competent to testify to his opinion of its value, basing such opinion upon the facts to which he had already testified. *Smith v. Indianapolis, etc., R. R. Co.*, 80 Ind. 233.

The extent of the witness' information affects the weight of his testimony, but not its competency. Special knowledge relating to the value of lands in that locality would, no doubt, add value and weight to his opinion.

Counsel, in addition to the specific objection made, argue generally as to all of this evidence that it was not competent to prove damages by proving the value of the property before and after the construction of the railroad. No such question is properly presented by the record, but if it was the authorities in this State are against him. *Yost v. Conroy*, 92 Ind. 464, and authorities there cited. See, also, many cases since decided.

We find no error in the record.

Judgment affirmed.

Filed Dec. 16, 1891.

No. 15,093.

MC CARTHY ET AL. v. SEISLER.

CHATTEL MORTGAGE.—Partnership Property.—Execution of by One Partner.—

One partner may execute a valid chattel mortgage of partnership goods, to secure a partnership debt, by signing the firm name.

SAME.—Purchase Without Notice Within Ten Days After Execution and Before Recording.—

A chattel mortgage recorded in the proper county within ten days after its execution is a valid lien on the property mortgaged as against a person who purchased it before such mortgage is recorded and without notice thereof.

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From the Miami Circuit Court.

J. L. Farrar and J. Farrar, for appellants.

W. C. Bailey and J. T. Cox, for appellee.

OLDS, J.—Oliver B. Harrison was the owner of a restaurant. In September, 1887, he sold the same to McNutt Bros. for \$850. They paid him \$300 cash and gave to him their note, secured by a chattel mortgage on the restaurant property purchased by them, for the balance, \$550. McNutt Bros. afterwards paid Harrison on the note and mortgage \$300.

On December 19th, 1887, the McNutts mortgaged the same property to John Seisler, the appellee, for a bill of \$90 for meat sold to McNutts by Seisler for the restaurant, executing a note and mortgage for said \$90, due in one week after date. On December 20th, 1887, McNutts owed to Harrison a balance of \$250 and interest on the note and mortgage, and on said day Harrison purchased the restaurant of McNutts, paying them \$25 in money and surrendering the note and mortgage. On December 21st Harrison sold the restaurant to the appellants, Daniel and Bart McCarthy, for \$250. Harrison testifies that the goods were worth at the time he sold them to McCarthy \$450 to \$500, and that he turned the goods over to McCarthy at 2 o'clock the 21st of December, 1887. The mortgage to the appellee, Seisler, was acknowledged, and was recorded in the proper county on the 21st day of December, 1887, at 2:30 o'clock p. m.

There was a finding and judgment for the appellee.

The mortgage to the appellee was executed by one member of the firm of McNutt Bros., George McNutt signing the firm name by himself, and acknowledging the mortgage. The mortgage was valid. The one partner had the right to execute the mortgage on the partnership property to secure the debt of the firm, and it was executed in proper form. Says Jones on Chattel Mortgages, section 46: "One partner may execute a valid mortgage of partnership goods to secure

a partnership debt by signing the firm name." *Woodruff v. King*, 2 N. W. Rep. p. 452.

Indeed, counsel for appellants do not seriously controvert the right of the one partner to mortgage the property. The debt due the appellee for meat furnished in running the restaurant, and the extension of time given for the payment, were a valid consideration for the mortgage.

It is insisted by counsel for the appellants that, the appellee's mortgage being executed on the 19th of December, and not having been recorded until 2:30 p. m. on the 21st of the same month, the appellants having purchased the goods for a valuable consideration on the 21st of December before the hour when the appellee's mortgage was placed on record, without any knowledge of the mortgage, they received a valid title to the goods as against the appellee's mortgage. In other words, it is contended that under our statute a mortgage of chattels is not valid as against innocent purchasers until it is actually recorded, notwithstanding it is recorded within the ten days fixed by the statute; that until a mortgagee places his mortgage on record an innocent party may purchase the goods of the mortgagor for value and hold them free from the mortgage. We can not agree with this position of counsel. Under our statute, section 4,913, R. S. 1881, the mortgagee has ten days within which to record his mortgage in the county where the mortgagor resides, and if he records it within that time it becomes a lien from the date of its execution against all persons, and the person purchasing the property after that date purchases the same subject to the lien of the mortgage. Ten days' time is given to the mortgagee within which to record his mortgage and preserve his lien, and this continues its validity from the time of its execution. *Hoadley v. Hadley*, 48 Ind. 452; *Krutsinger v. Brown*, 72 Ind. 466; *McFadden v. Hopkins*, 81 Ind. 459.

If the theory of counsel for the appellant be correct, there

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would be no security whatever to the mortgagee in accepting a chattel mortgage as security for money loaned, or as security for a debt, for notwithstanding he had his mortgage, if during the time he was taking or transmitting it to the county recorder for record the mortgagee made a sale of the property to an innocent person, the lien of his mortgage would be divested and non-enforceable as against such purchaser. This is against the theory of our registration laws. The time for recording has been universally treated as a time within which the mortgagee might have his mortgage recorded and preserve his lien against all persons purchasing or taking a lien upon the same property subsequent to the execution of his mortgage.

There is no error in the record.

Judgment affirmed, with costs.

Filed Dec. 16, 1891.

No. 15,986.

TAYLOR v. THE STATE.

130	66
135	575
130	66
155	701
130	66
165	402
165	439
165	566

CRIMINAL LAW.—*Failure of Proof.*—*Unnecessary Averment.*—A mere failure to prove, with technical exactness, an averment which was not necessary, nor of the essence of the offence charged, will not be sufficient to authorize a reversal of the case on appeal.

PRACTICE.—*Variance.*—*When Objection Must be Raised.*—A party desiring to take advantage of a variance between the pleadings and proof must make his objection at the proper time during the trial, and, if he does not do so, he can not afterwards avail himself of such variance.

WITNESSES.—*Separation.*—*Witness Disobeying Order.*—*Party not at Fault.*—Where a party is without fault, and a witness disobeys an order directing a separation of the witnesses, such party can not be denied the right of having the witness testify, but the conduct of the witness may be shown to the jury upon the question of his credibility.

From the Spencer Circuit Court.

Taylor v. The State.

H. M. Logsdon, W. C. Mason, A. J. Payton, L. B. Osborne, for appellant.

A. G. Smith, Attorney General, and *R. M. Johnson*, Prosecuting Attorney, for the State.

CORFEY, J.—The appellant was indicted, tried, and convicted, in the Spencer Circuit Court, upon a charge of robbery. He appeals to this court, and assigns as error the overruling of his motion for a new trial.

It is insisted that the evidence does not support the verdict of the jury finding the appellant guilty of the charge against him.

On the evening of the 9th of April, 1890, soon after dark, a short distance from the town of Rockport, David Axton, while returning home from the town in his wagon, was attacked and robbed, the person attacking him taking from his person the sum of eighty dollars. The evidence connecting the appellant with the robbery is circumstantial, and somewhat conflicting, but it can not be said there is no evidence connecting him with the crime. We can not disturb the verdict on the evidence.

The indictment charges that the money taken at the time of the robbery was "lawful money of the United States." It is contended by counsel for the appellant that, for anything appearing from the evidence in the cause, the money taken may have been National Bank notes, and that such proof does not sustain the charge that it was "lawful money of the United States."

Section 1750, R. S. 1881, provides that "In every indictment or information * * * in which it is necessary to make an averment as to any money, or bank bills, or notes, United States treasury notes, postal and fractional currency or other bills, or notes issued by any lawful authority and intended to pass and circulate as money, it shall be sufficient to describe such money, bills, notes, or currency simply as money, without specifying any particular coin, note,

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bill, or currency ; and such allegations shall be sustained by proof of any amount of coin or of any such note, bill, or currency, although the particular species of coin of which such amount was composed, or the particular nature of such note, bill, or currency be not proved."

It is conceded that if the money taken had been described simply as " money," the proof in the case would support the indictment in this respect ; but it is claimed that, inasmuch as it is described as " lawful money of the United States," it was necessary to prove that the money was either coin or legal tender notes, issued by the United States Government.

It has often been held in this, as well as in other States, that unnecessary matters of description in an indictment, or information, must be proved as charged. *Ball v. State*, 26 Ind. 155 ; *Wertz v. State*, 42 Ind. 161 ; *Dennis v. State*, 91 Ind. 291.

In *McQueen v. State*, 82 Ind. 72, it was said, however : " It would be unreasonable to expect one who is robbed of money, or its representative, to give an accurate description of it, and it would render it almost impossible to convict a thief or a robber if courts should undertake to require the prosecutor in all cases to give a particular description of the money or notes feloniously taken."

It was no doubt the purpose of the Legislature in enacting the statute above set out to avoid the difficulty often encountered by the prosecutor in proving an exact description of the money in cases like this, and it is our duty, so far as we can do so, consistent with legal rules, to carry that purpose into effect. It was the evident intention of the prosecutor in drafting the indictment in this case to make it conform to the statute, otherwise there would have been a more particular description of the money taken, but in doing so he added unnecessary words of description. In the case of *Mergentheim v. State*, 107 Ind. 567, it was said : " But the variance, if such it be, had reference only to a matter of unnecessary description ; and for a mere failure to

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prove with technical exactness an averment which was not necessary nor of the essence of the offence charged, we would not, under the rules governing appeals in criminal cases, be authorized to reverse."

The evidence in this case proves that the money taken was paper money consisting of tens and five-dollar bills. The money taken from the appellant at the time of his arrest, and which is claimed by the State to be the money stolen, was deposited with the clerk of the court. He was called as a witness, and produced the money and exhibited it to the court and jury, after which it was handed to counsel for the appellant for examination. No objection was made then or at any other time during the trial, so far as it appears by the record, that there was any variance between the proof and the allegations in the indictment.

The most that can be said of the objection now urged is, that there is a variance between the allegations of descriptions in the indictment and the proof offered by the State to sustain such allegations.

A party objecting to a variance between the pleadings and the proof must make his objection at the proper time during the trial, and, if he does not do so, he can not afterwards avail himself of the objection. *Graves v. State*, 121 Ind. 357.

In this case all the proof relating to the money taken went to the jury without objection at the time it was introduced or afterwards.

It is now too late to urge this objection, especially as there was evidence in the cause from which the jury could have drawn the inference that the money was of the kind described in the indictment. David Axton testified that it was lawful money of the United States, but upon cross-examination stated that he did not know whether it was greenbacks or national bank notes.

The case of *Lewis v. State*, 113 Ind. 59, and similar cases, are not in point, for there it can not be said there was

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any effort to follow the statute under consideration, as each bill stolen was particularly described in the indictment.

The record discloses the fact that on the motion of the appellant the court entered an order separating the witnesses and excluding them from the court-room during the trial.

The appellant at the proper time called a witness on his behalf, to whose competency the State objected on the ground that such witness had remained in the court-house, in disobedience of the court's order, and had heard the other witnesses in the cause testify.

It appeared that the witness had not been subpoenaed, and did not know that she would be called upon to testify in the cause, but the appellant knew she was in possession of the fact which he proposed to prove by her. He and his counsel denied all knowledge of the fact that the witness was in the court-room during the trial. The court nevertheless refused to allow her to testify in the cause. The fact proposed to be proved by her was material to the defence in the cause.

We think the court erred in excluding the evidence of this witness.

The question here presented received a careful consideration in the cases of *Davis v. Byrd*, 94 Ind. 525; *Burk v. Andis*, 98 Ind. 59; and *State, ex rel., v. Thomas*, 111 Ind. 515.

The rule to be deduced from these cases is that, where a party is without fault and a witness disobeys an order directing a separation of the witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility. We are not called upon in this case to inquire what the rule would be in a case where the party had connived at the presence of a witness in violation of the order of the court, or where he had knowingly permitted him to remain, as, in this case, it does not appear that the appellant had any knowledge of the witness' presence in the court-room.

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For the error of the court in excluding the testimony of this witness the judgment must be reversed.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed Dec. 15, 1891.

No. 15,160.

WILLIAMS ET AL. v. THE CITIZENS' RAILWAY COMPANY.

MUNICIPAL CORPORATIONS.—*Act for Incorporation of Cities.*—*Right of Court to Decide Controversies Concerning Private Rights.*—The act for the incorporation of cities does not take from the courts authority to decide legal controversies concerning personal or property rights, and does not vest in the common councils of cities the power to determine such controversies.

SAME.—*Use of Street to Move House.*—*Destruction of Private Property.*—The moving of a house along a public street of a city is an extraordinary use thereof for an unusual purpose, which may be controlled or denied; and the owner of such a house can not insist on so moving it if such moving will result in the destruction of the property of others.

STREET RAILWAYS.—*Moving House Across Track.*—*Destruction of Wires.*—*Failure of Council to Act.*—The courts have the power to restrain the moving of a house across a street electric railroad when such moving will result in the stopping of the cars an unnecessary length of time, and the cutting or destruction of the wires, even though the common council of the city have failed or refused to take any steps to prevent such injury or destruction.

CORPORATION.—*Ultra Vires.*—*Collateral Attack.*—If there is an assumption of corporate rights and functions, and an exercise of such claims and functions under claim and color of law, only the State can question the validity of the assumption and exercise of such functions and rights; and an individual can not successfully assail them in a collateral proceeding.

From the Elkhart Circuit Court.

H. C. Dodge, for appellants.

J. H. Baker and F. E. Baker, for appellee.

180	71
155	64
130	71
180	568

130	71
170	398

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ELLIOTT, C. J.—The complaint contains these material allegations: That the appellee is a corporation, organized under the laws of the State for the purpose of constructing an electric street railway upon the streets of the city of Elkhart; that it is authorized to operate a railway with any kind of motive power except steam; that it is authorized to erect poles and stretch wires along the streets for the purpose of operating its line of railway, by means of electricity; that it has constructed its tracks, erected poles, stretched wires and procured electrical appliances for the purpose of operating its railway; that in so doing it has expended more than eighty-eight thousand dollars; that it has constructed its tracks, erected poles, and made necessary connections for operating a line upon Main street, in the city of Elkhart, under the right and authority conferred upon it; that its railway tracks upon that street have been, and are used by it in conducting its business as a public carrier of passengers, and for such purpose are, and have been, in constant use; that the interruption of its business would interrupt a public service and use much needed by the public; that one of the defendants is the owner of a frame building, which it has employed one of its co-defendants to move upon and along Main street, and the work of moving the building has been commenced; that the building is so large that it can not be moved along Main street without destroying the wires of the plaintiff, and entirely stopping the movement of its cars on Main street, and other streets of the city; that the defendants are threatening to cut, or otherwise destroy the wires, and to stop the running of cars; that they are moving the house so rapidly that the building will reach Main street within three hours; that the injury which they threaten to do will be irreparable, and will wholly prevent the use of the street and cause the plaintiff great damage; that the building can be moved without passing on Main street. Prayer for an injunction.

The point first made by the appellants' counsel in his as-

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sault upon the complaint is, that "the Elkhart Circuit Court had no jurisdiction." In support of this point it is argued that the common council of the city has exclusive jurisdiction over the city streets, and that the court could, therefore, have no jurisdiction of the general subject. We are referred to the cases of *Kistner v. City of Indianapolis*, 100 Ind. 210, and *Wood v. Mears*, 12 Ind. 515, but it is palpably evident that these cases are not relevant to the present controversy. It needs neither argument nor authority to make good the proposition that the act for the incorporation of cities does not take, nor mean to take, from the courts the authority to decide legal controversies concerning personal or property rights, and vest in the common council of cities the power to determine such controversies. The decision of such controversies must be made by judicial tribunals, and to them an injured party has a right to appeal for a vindication of his rights.

A failure, or refusal, of the common council of a city to take steps to prevent the injury or destruction of a line of railway does not preclude the owner from seeking redress in the courts of the State. Where a right to use a street is acquired pursuant to statute, and under a license from the municipality, it is in the nature of a contract right, and the municipality itself can not destroy nor materially impair it. The courts must decide all controversies in which such rights are involved. *Indianapolis, etc., R. R. Co. v. Citizens St. R. R. Co.*, 127 Ind. 369. See authorities collected in *Elliott Roads and Streets*, 564, notes 1 and 2.

It is undoubtedly true that all such rights are subordinate to the paramount power usually denominated the police power, for that power can not be annihilated by contract. *Jamieson v. Indiana, etc., Co.*, 128 Ind. 555. See, also, authorities cited in *Elliott Roads and Streets*, 573, note. But here no question concerning the nature of that great power is presented.

The contention that the appellee must fail because there

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is no statute authorizing the use of electricity as a motive power for propelling cars along a line of street railway can not prevail, for the reason that the appellants are not in a position to make available the doctrine they assert, even if, it should be granted that the doctrine is sound.

There is plausibility, at least, in the argument of the appellee's counsel that a just and reasonable construction of the statute providing for the incorporation of street railway companies authorizes the employment of any kind of motive power now in common use except steam. The terms "street railway" or "horse railway" may possibly be considered as generic terms, and if so their use would not necessarily imply that only animals can be employed for propelling cars. But we feel that it is neither necessary nor proper for us to attempt to give an authoritative decision of this question in the present case, and we refrain from doing so. Our conclusion upon this branch of the case must be placed upon another ground.

In the case before us the municipal council passed an ordinance authorizing the use of electricity as a motive power. The company, acting under this grant, has used, and is using, electricity. The company has, at least, assumed to organize as a corporation under the laws of the State, and to organize for the purpose of operating a street railway employing electricity as the motive power for the propulsion of its cars along its tracks. It has assumed under color of law and claim of right—if, indeed, its assumption is not founded on stronger grounds—to exercise corporate functions as an electric street railway company. We can see no reason why the case is not governed by the rule that where there is an assumption of corporate rights and functions, and an exercise of such rights and functions under claim and color of law, only the State can question the validity of the assumption and exercise of such functions and rights, and an individual can not successfully assail them in a collateral proceeding. The case seems to us, indeed, to be one

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strongly invoking the application of the rule. *Brookville, etc., T. P. Co. v. McCarty*, 8 Ind. 392; *Aurora, etc., R. R. Co. v. City of Lawrenceburgh*, 56 Ind. 80; *White v. State*, 69 Ind. 273; *Baker v. Neff*, 73 Ind. 68; *Logan v. Vernon, etc., R. R. Co.*, 90 Ind. 552, and authorities cited. Interesting discussions of the general subject will be found in the cases of *New Orleans, etc., Co. v. Hart*, 40 La. Ann. 474; *Taggart v. Newport, etc., R. W. Co. (R. I.)*, 19 Atl. R. 326; *Williams v. City Electric, etc., R. W. Co.*, 41 Fed. Rep. 556; *Potter v. Saginaw, etc., R. W. Co.*, 83 Mich. 285.

If it were conceded that the acts of the corporation were beyond its powers, it is, nevertheless, quite clear that an individual can not insist that its corporate existence has terminated, or that he may, at his pleasure, confiscate or destroy its property. It would violate the plainest principles of law to permit an individual citizen to confiscate or destroy the property of a corporation which has assumed to exercise rights under the laws of the State, and to which the officers of a governmental subdivision have given recognition by granting to it the right to use the streets of a city. This would be true even in a case where no extraordinary claim was asserted by the individual, and certainly is true where an individual claims the right to make an extraordinary use of the public streets.

The appellants in this case are not asking to be allowed to make an ordinary use of the streets of the city; they are, on the contrary, asking that they be permitted to use the streets in an extraordinary mode and for an unusual purpose. *Day v. Green*, 4 Cush. 433; *Graves v. Shattuck*, 35 N. H. 257. See authorities cited in note 2, *Elliott Roads and Streets*, p. 578.

If the appellants were asking to be allowed to make use of the street in the ordinary mode, we should have a very different case, but that is not what they demand. To concede their demands would be to assert a doctrine that would authorize an individual to interrupt traffic on great lines of

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railways running through a city at his pleasure, no matter how grave the injury that would result from such an interruption to the public or the railway companies. It is not to be forgotten that the public have interests in such a controversy as this, as well as private corporations, and an individual who seeks to disturb the public right will find no favor where the claim he asserts is an extraordinary one, such as that here asserted. That the demand in this case is an extraordinary one is shown by the authorities to which we have here referred, but it may be made more plain by simply saying that the purpose for which highways are laid out and dedicated is that of travel in the usual modes. It would be strange, indeed, if large buildings could be moved along the thronged streets of a city without control or restriction; and it would be equally strange if the owner of a building could destroy the property of others in order to enable him to move his building from one place to another.

We are not in this case concerned with the question as to whether a house may be moved across a street railway track where no injury will be done and where only a few minutes' suspension of traffic will be caused; for here the complaint and the special finding show that the appellee's property would be destroyed and traffic interrupted for many hours if the appellants were permitted to do what they have attempted and threatened to do.

Judgment affirmed.

Filed Dec. 15, 1891.

The State, *ex rel.* Hatfield, v. Ireland *et al.*

No. 16,261.

THE STATE, EX REL. HATFIELD, v. IRELAND ET AL.

130 77
161 434

130 77
1189 66

QUO WARRANTO.—*Information.*—*Relator's Interest Must be Shown.*—In an action to dissolve a corporation, brought by an individual, the information must disclose the relator's interest in the subject-matter of the action; and merely alleging "that the relator claims an interest in the corporation and franchise which is the subject of this information," is not sufficient.

From the Huntington Circuit Court.

J. M. Hatfield and *E. E. Kelsey*, for appellant.

J. B. Kenner, for appellees.

MILLER, J.—The appellant filed an information in the circuit court, which, omitting the caption, is as follows:

"The relator herein gives the court to understand that the defendants are acting within this State as a corporation without being legally incorporated, and have been so doing for more than six months last past, usurping the franchise of being a corporation by the name of the 'Huntington City Building, Loan and Savings Association,' and in that name of pleading and being impleaded, answering and being answered, contracting and being contracted with, and of holding, using, acquiring, selling, conveying and otherwise disposing of property, real and personal, within the State of Indiana; that relator claims an interest in the corporation and franchise which is the subject of this information.

"Wherefore, the plaintiff prays the court that the defendants be required to show by what right, if any, they claim to have, use and enjoy the liabilities, privileges and franchises aforesaid, and that they be ousted from using the same."

The court sustained a demurrer to this pleading, and this ruling is assigned as error here.

The appellees contend, and we think rightfully, that the information does not disclose such interest in the subject

The State, ex rel. Hatfield, v. Ireland et al.

matter of the action as will enable the relator to maintain the suit.

This involves the construction of two sections of our code of procedure, which are as follows:

"Section 1132. The information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information.

"Section 1133. The information shall consist of a plain statement of the facts which constitute the grounds of the proceeding, addressed to the court."

We do not regard the statement in the information that the relator "claims an interest" as an allegation of an issuable fact, but simply of a conclusion of the pleader, not predicated upon any facts disclosed in the pleading. We are satisfied that one of the facts, to be plainly stated in the information, is the nature of the interest claimed by the relator in the franchise or corporation, when the court can, as a matter of law, determine whether it is such an interest as will give him a standing in court to maintain the action.

The nature of the interest which a relator claims is one peculiarly within his own knowledge, and it can be no hardship upon him to disclose the facts which, in his opinion, entitle him to occupy the time of the court, and to require the defendants to show their authority to act as a corporation.

For aught that appears in the pleading, the interest claimed by the relator may be such as to estop him from questioning its existence as a corporation.

Judgment affirmed.

Filed Dec. 15, 1891.

The Michigan Mutual Life Insurance Company v. Naugle.

No. 14,995.

**THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY v.
NAUGLE.**

130	79
135	418

CHANGE OF VENUE.—*Number of Changes.*—A party is entitled to only one change of venue from the county.

SAME.—*Failure to Pay Costs.*—*Payment by Opposite Party.*—If the party asking the change of venue fails to pay the costs, the opposite party may do so and cause the change to be perfected, unless the conduct of the party asking it shows that he had waived the change; but a mere failure to perfect it does not show such a waiver.

SAME.—A party can not prevent the court's sending a cause to a particular county by showing in his affidavit for a change that the same causes are operating against him in such county as exist in the county where the suit was brought; such a statement is for the information of the court, serving to aid it in the exercise of its discretion.

LIFE INSURANCE.—*Suicide.*—*Forfeiture for.*—*Accidental Death.*—A condition in a policy of life insurance that it shall be void if the insured shall die by his own hand has no application where the insured kills himself by accident.

SAME.—*Suicide.*—*Insanity.*—Such a condition does not apply if the insured takes his life while of unsound mind, if his mind is so impaired by disease that he does not comprehend the moral character of his act, though he may have sufficient mental capacity to know the physical consequences of the deed.

SAME.—*Compromise Procured by Fraud.*—Where a party has been induced by fraud to settle a claim on an insurance policy, and has surrendered the policy on the payment of the amount of the compromise, he may rescind such compromise and sue for the remainder due on the policy.

From the Jasper Circuit Court.

W. S. Hartman and W. H. Hamelle, for appellant.

E. P. Hammond, W. B. Austin, U. Z. Wiley and D. L. Bishop, for appellee.

MCBRIDE, J.—This suit was commenced in the Benton Circuit Court, and the venue changed to the Jasper Circuit Court. The appellant, when it appeared in the Jasper Circuit Court, moved to remand the cause to Benton county for trial. This motion was overruled. The appellant alleges that this was error.

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The change of venue from Benton county was granted on motion of the appellant, who was the defendant below. The affidavit upon which the motion was based alleged that the party asking it could not have a fair and impartial trial of the cause in Benton county for the reason that in that county an odium attached to the defence, and also because of bias and prejudice. It also contained averments that the same reasons which would operate to prevent a fair trial in Benton county, would also operate to prevent a fair trial of the cause in Jasper and in Newton counties. By the same motion a change of judge was asked upon grounds sufficiently shown. Notwithstanding the showing as to the counties of Jasper and Newton, the court ordered the venue changed to Jasper county.

Twenty days' time was allowed within which to perfect the change from the county. The appellant did not pay the costs within the specified time, but the appellee, the plaintiff below, did pay them, and the papers were, within the time limited, transmitted to the clerk of the Jasper Circuit Court, and filed by him, and the cause docketed in that court for trial.

The appellant appeared in the Jasper Circuit Court, and moved to remand the cause to the Benton Circuit Court, showing in support of the motion the foregoing facts.

Counsel for the appellant also, in their showing in support of their motion to remand, assign as their reason for not paying the costs and perfecting the change of venue themselves, that after investigation they concluded that they could have a fairer trial in Benton than in Jasper county, and therefore decided to abandon their application to change the venue of the cause. The appellant insists that the payment of the costs by the appellee was unauthorized; that it did not justify the clerk in transmitting the papers, and that the Jasper Circuit Court did not thereby rightfully acquire jurisdiction of the cause.

It is apparent that the Legislature, in the enactment of the

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statute governing changes of venue, sought to accomplish a double purpose. It was designed, primarily, to enable litigants to remove their causes for trial from an atmosphere of prejudice and unfairness to a locality where they might find fair and unbiased triers, with surroundings not tainted by an undeserved odium affecting them or their cause. At the same time they wished, so far as possible, to limit the mischief that might be done by those whose only wish was delay, and the hindrance of justice. Therefore, while providing for changes of venue, they allow but one change, and invest the court with the discretion of designating the county to which it shall go, and the time within which the change shall be perfected by the payment of the cost.

When the one change allowed is granted, whether it is perfected or not, the party who asked it can have no other change. The making of the order ends his right. He has then had the one change of venue allowed him, whether he avails himself of it or not. When a party applies to a court for a change of venue it must be presumed that the application is made in good faith, not for delay, but because the party asking it really believes he can have a fairer trial elsewhere. The opposite party is authorized to act upon that presumption. While no duty rests upon him in the matter, and the party who asks for the change is required to do all that is necessary to perfect it, we can see no good reason why he should complain if his opponent takes him at his word and aids in perfecting it. It certainly can not be said that he is harmed by it. But it is said that a party has the right to waive his right to a change of venue after it has been granted him, and that this practice would deprive him of that right. It can not be said that such a waiver is the exercise of a right. The change of venue is his by right, and his waiver is simply his neglect to avail himself of that right.

A failure to pay the costs of the change within the time

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limited does operate as a waiver by express provision of the statute, but it does not follow that the opposite party is compelled to wait until the expiration of that time to ascertain if he will by his neglect thus waive it.

We wish it understood, however, that what is said above is limited to cases like that before us, where the only evidence of waiver is the mere neglect or failure of the party to avail himself of the change granted. We do not wish to be understood as holding that a party may not, after he has been granted a change of venue, in open court and before the change is perfected, make such waiver of the right as will result in leaving the cause still pending in that court, to be removed only on application of some other party.

While we do not decide that question, because not before us in this case, we are inclined to the opinion that, while the order granting the change would bar the right of the party to any further change of county, nevertheless he may thus waive the actual removal of the cause out of the county on his application, after which waiver the opposite party would have no right to perfect it.

It was not error for the court to disregard statements in the affidavit relating to the alleged odium and prejudice existing in Jasper and Newton counties.

Such statements in an affidavit for change of venue, relating to counties other than that in which the cause is pending, can be regarded only as matter of information, serving to aid the court in the exercise of its discretion in determining to what county the cause should be sent. Viewed in that light, they are not improper, but they are in no sense binding upon the court, and may be disregarded.

This brings us to the consideration of the next alleged error discussed by counsel, that the court erred in overruling separate demurrers to each paragraph of the complaint. The appellee is the widow of John Percy, who died March 10, 1884. At the time of his death he held an insurance policy upon his own life, issued by the appellant in favor of

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the appellee for the sum of \$2,000. The premiums were all paid at the time of his death, and appellee, in accordance with the terms of the policy, made proper proof of his death. May 29th, 1884, the appellant compromised with her by paying her \$1,000, and obtained from her a surrender of the policy, and a release as to the remainder due thereon.

The policy contained a clause to the effect that it should be void if the assured should die by his own hand. It was alleged that this compromise was obtained by the appellant under pretence that Percy died by his own hand under circumstances rendering the policy void.

The complaint sets out causes of action *ex delicto* to recover damages growing out of alleged fraud, which it was charged was practised by the representatives of the appellant in effecting the compromise. Facts are stated in each paragraph of the complaint, showing the issuing of the policy to John Percy for the benefit of appellee, his death, proofs of the same and compliance upon his and her part with the conditions of the policy, and that appellant on May 29, 1884, effected a compromise with her by paying \$1,000, being only one-half the amount due upon the policy.

It is averred in each paragraph of the complaint :

"Said John Percy died suddenly, and, although said plaintiff was living with him at the time of his death, she was for a long time prior thereto, at the time thereof, and for a long time thereafter, in exceedingly bad health, and in a nervous and excited condition of mind, so that she was incapable of judging or determining the cause of said Percy's death, and had no knowledge or means of knowledge as to whether he died a natural death, or from an overdose of laudanum ; and she was also incapable, from her said bad health and nervous and excited condition, of forming any opinion as to whether said Percy was or was not of sound mind at and before the time it was claimed by said defendant that he had taken said laudanum."

It is also averred in each paragraph of the complaint :

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“That on said 29th day of May, 1884, said defendant, for the purpose of procuring a surrender of said policy by paying said plaintiff the sum of only one thousand dollars, and also procuring from her a release of the remainder due upon said policy, falsely and fraudulently represented to said plaintiff that said John Percy died by his own hand while of sound mind, and that it had evidence whereby it could prove that he so died, and that such evidence would defeat any suit that she might bring upon said policy; and that if she did not accept the sum of one thousand dollars, and surrender said policy, and release said defendant as to the residue thereof, she would never get anything; that at the time said representations were made, said plaintiff was in bad health and in a weak and feeble condition of mind as well as of body, and had never had any experience whatever in business, and knew nothing about life insurance, and did not know what the facts were concerning her said husband's death, nor what facts relating thereto said defendant could or might be able to prove, and she believed and relied upon said representations and accepted said one thousand dollars, and surrendered to said defendant said policy, and signed and delivered to it said release.”

In the first paragraph it is averred that the deceased did not die by his own hand, but died a natural death. In the second it is alleged that his death was accidental in taking an overdose of laudanum. In the third it is stated :

“That said John Percy died from the effects of laudanum, administered by his own hand while he was of unsound mind, and when he was incapable of distinguishing as to the right or wrong or moral consequences of the act he was doing in taking said laudanum.”

It is alleged in each paragraph, “and that said defendant had no evidence whatever to prove that her said husband died of his own hand while of sound mind. The plaintiff avers that said representations were made by said defendant for the fraudulent purpose of swindling, cheating and de-

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frauding this plaintiff out of one thousand dollars, and that the same were recklessly made by said defendant, it at the time not knowing that they were true."

The only material difference between the several paragraphs of the complaint are that, in the first, it is alleged that the deceased died a natural death; in the second that, while he died by his own hand, his death was accidental; and in the third that, while death was self-inflicted, he was at the time of unsound mind, and incapable of judging the moral consequences of the act.

Under the facts alleged in the first paragraph, that the insured died a natural death, there was no forfeiture of the policy. And this is also true of the facts stated in each of the other paragraphs.

The condition in a policy of life insurance, that it shall be void if the insured shall die by his own hand, has no application where the insured kills himself by accident *Northwestern, etc., Ins. Co. v. Hazelett*, 105 Ind. 212; *Equitable, etc., Society v. Patterson*, 41 Ga. 338 (5 Am. Rep. 535); *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52 (7 Am. Rep. 410); *Penfold v. Universal Ins. Co.*, 85 N. Y. 317 (39 Am. Rep. 660); *Edwards v. Travelers' L. Ins. Co.*, 20 Fed. Rep. 661.

Nor does such a condition in a policy of life insurance apply if the insured destroys his life while of unsound mind, if his mind is so impaired by disease that he does not comprehend the moral character of the deed, though he may have sufficient mental capacity to know the physical consequences of the act. *Breasted v. Farmers', etc., Co.*, 8 N. Y. 299; (59 Am. Dec. 482, and note on p. 487); *Phadenhauer v. Germania L. Ins. Co.*, 7 Heisk. 567 (19 Am. Rep. 623); *Phillips v. Louisiana, etc., Ins. Co.*, 26 La. Ann. 404 (21 Am. Rep. 549); *Connecticut, etc., Ins. Co. v. Groom*, 86 Pa. St. 92 (27 Am. Rep. 689); *Schultz v. Insurance Co.*, 40 Ohio St. 217 (48 Am. Rep. 676); *Life Ins. Co. v. Terry*, 15 Wall. 580; *Insurance Co. v. Haven*, 95 U. S. 242; *Manhattan L.*

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Ins. Co. v. Broughton, 109 U. S. 121 ; 21 Central Law Journal, 378.

It is insisted by the appellant, however, that the alleged fraudulent representations were not such as the appellee had the right to rely upon—that they were not of material facts, and were, at most, representations of opinion. This, we think, is true as to some of the representations made, but not of all. The representations that the decedent had died by his own hand, while he was of sound mind, and that the appellant had evidence whereby it could prove that he so died, were each representations of fact, and of material facts. We think, under the circumstances detailed in the complaint, the appellant was justified in relying and acting upon them.

In our opinion the facts stated in the complaint clearly bring the case within the rule stated in *Home Ins. Co. v. Howard*, 111 Ind. 544, which, like this, was where a party alleged that he had been induced, by fraud, to settle a claim on an insurance policy, and surrender the policy on receiving a portion of the sum due. The court said (page 548), “a person so circumstanced may retain what he has received, and sue whoever is liable for the consequences of the deceit by which the compromise was brought about, and recover whatever damages resulted therefrom.”

See, also, *Johnson v. Culver*, 116 Ind. 278; *Hays v. Massachusetts, etc., Ins. Co.*, 125 Ill. 626.

We think each paragraph of the complaint stated a good cause of action.

The only remaining question is, was the verdict sustained by sufficient evidence?

As we read the evidence, if the question were before us to be decided on the weight of evidence, we could not say that there was a preponderance sustaining the appellee in all the material elements of the controversy.

There is, however, some evidence *tending* to establish every material fact necessary to justify a recovery by her. Under the now thoroughly established practice of this court,

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there can be no interference with the result reached by the jury and the trial court. The jury, not only by their general verdict, but by answers to interrogatories propounded by both parties, find every material averment of the complaint proven. The court below has refused to disturb their finding, and we can not.

Judgment affirmed, with costs.

Filed Dec. 15, 1891.

No. 16,000.

DYE v. THE STATE.

PRACTICE.—Assignment of Error.—Assigning that the court erred in “overruling the appellant’s answer in abatement” presents no question on appeal.

CRIMINAL LAW.—Dismissal.—When May be Made.—Before jeopardy attaches a prosecution may be dismissed, although an indictment has been preferred.

SAME.—Information.—When Prosecution May be by.—After a *nolle prosequi* is entered and a prosecution ended, the accused may be prosecuted by information if the grand jury has been discharged and the court is in session.

SAME.—Conspiracy.—Proof of. Co-Conspirators.—A conspiracy can not be proved by the declarations of the alleged conspirator as against his co-conspirator.

SAME.—Declarations of Receiver as Against Thief.—The declarations of a receiver of stolen goods are not admissible against the thief, unless it is first shown that a conspiracy existed between the former and the latter.

SAME.—Admission of Receiver.—If there be evidence showing a conspiracy, the admissions of the receiver made before the crime is committed is competent as against the thief; otherwise it is not.

From the Union Circuit Court.

T. D. Evans, for appellant.

A. G. Smith, Attorney General, *G. W. Pigman*, Prosecuting Attorney, and *R. Conner*, for the State.

130	87
130	238
130	87
140	89
140	358
130	87
157	148

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ELLIOTT, J.—The appellant has specified as error that the court “overruled his answer in abatement.” This specification is not a proper one, for no specification in the assignment of errors is sufficient unless it indicates with clearness and precision the ruling assailed. The ruling which the appellant probably intended to specify is that made in sustaining the demurrer to his answer in abatement, but he has failed to specify that ruling, and if we strictly applied the law we should be compelled to hold that his specification is utterly ineffective. We have, however, deemed it best to examine the questions sought to be presented by the specification mentioned.

The answer in abatement is bad. Two propositions support this conclusion :

First. Before jeopardy attaches a prosecution may be dismissed, although an indictment has been preferred.

Second. After a *nolle prosequi* is entered and a prosecution ended, the accused may be prosecuted by information if the grand jury has been discharged and the court is in session. *Rowland v. State*, 126 Ind. 517 ; *State v. Drake*, 125 Ind. 367 ; *Sovine v. State*, 85 Ind. 576.

It is declared by the authorities that the admissions of the thief are not admissible in evidence against the receiver of the stolen goods when not made in the presence of the latter or where no conspiracy exists. *Reilley v. State*, 14 Ind. 217 ; *Roscoe Crim. Ev.* (8th ed.) 53. If the admissions of the thief in this case were competent, it can only be upon the ground that the accused had conspired with the thief to commit the crime. We have not been shown any evidence tending to establish a conspiracy, nor have we been able to find any. If we could find any such evidence, direct or circumstantial, we could sustain the judgment, but we have not been able to find any evidence remotely tending to prove a conspiracy. We do not, indeed, understand the counsel representing the State to assert that there is any such evidence. What counsel say is this : “ The evidence objected

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to tended to prove a conspiracy." But it is a rudimental principle that agency, conspiracy or the like, can not be proved by the declarations of the alleged agent or conspirator. To make the admissions of an alleged conspirator evidence there must be some evidence, although it need not be strong, of the existence of the conspiracy. Where there is some such evidence, either direct or circumstantial, the admissions, if made before the crime is committed, is competent, otherwise it is not.

Judgment reversed, with instructions to award a new trial.

Filed Oct. 15, 1891; petition for a rehearing overruled Dec. 15, 1891.

No. 15,009.

THE INDIANAPOLIS, DECATUR AND WESTERN RAILWAY COMPANY v. CENTER TOWNSHIP.

PLEADING.—*Former Adjudication Shown by Complaint.*—*Demurrer.*—Where a complaint shows that the matter in controversy has been once adjudicated between the plaintiff and defendant, a demurrer to it for want of facts should be sustained.

JUDGMENT.—*Effect of on Parties.*—*Reservation of Right to Litigate.*—*Agreement that all Defences May be Considered Under General Denial.*—A judgment is binding upon the parties as to all matters litigated; but if such judgment contains a special reservation as to a particular part of the subject-matter of the litigation, providing that it shall not operate and be binding upon the parties as to such part, it does not conclude the parties as to such part, even though it was agreed on the trial that all defences might be given under the general denial.

SAME.—*Res Judicata.*—*How Determined.*—In determining whether a matter has been adjudicated, the court will examine the pleadings and the judgment rendered thereon.

ACTION.—*Splitting Up.*—*Defendant Having Divided Fund Before Suit Brought.*—If the plaintiff sue for a part of a fund when the whole is due, and recover a judgment for such part, he can not afterwards sue for the remainder; but if the defendant has divided the fund, and placed a part of it in the hands of a third person, such third person can not object

130	86
133	670
130	89
138	478
130	89
143	67
130	89
145	286
130	89
160	95

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that he is not liable on the ground that the plaintiff has recovered a judgment against the original defendant for the amount retained by him.

STATUTE OF LIMITATIONS.—How Pleaded.—An answer averring that the items mentioned in the complaint accrued more than six years before the commencement of the suit is bad; the averment should be that the cause of action did not accrue within six years next before the commencement of the action.

SAME.—Amended Complaint.—An answer averring that the cause of action accrued more than six years next before the filing of the *amended* complaint is bad; the averment should be, "before the commencement of the action."

From the Marion Circuit Court.

S. M. Shepard and *C. Martindale*, for appellant.

H. N. Spaan, *A. C. Harris* and *L. Cox*, for appellee.

COFFEY, C. J.—The complaint in this case, by reason of the number of exhibits therein set forth, is of unusual length, but the controlling facts, as shown by its allegations, are substantially as follows :

In the year 1870, Center township, in Marion county, voted a donation of \$65,000 to aid in the construction of the Indiana and Illinois Central railway. The tax was duly assessed, placed upon the tax duplicate of Marion county, collected and passed into the county treasury. The appellant, by reason of consolidations, re-organizations and assignments, has succeeded to all the rights of the Indiana and Illinois Central Railway Company in this fund. In the year 1880 Center township brought an action against the board of commissioners of Marion county to recover this fund, upon the assumption that it had been forfeited by the railway company, and recovered a judgment for the sum of \$71,102.48. Of this sum the county paid to the township \$17,112.50.

The railway company was not a party to that suit. By reason of complications growing out of agreements to compromise the disputes between the township and the county, and by reason of a claim made upon the county by the rail-

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way company and certain of the tax-payers of the township for the fund then in dispute, the county refused to make further payments, whereupon the township instituted a suit in the Marion Superior Court to recover a new judgment and to estop the railway company and the tax-payers from making any further claim to the fund. In this action the railway company filed an answer and cross-complaint.

The cross-complaint was against both the county and township, and alleged substantially the facts averred in the second paragraph of the answer. The cross-complaint contains the following allegations, viz.: "That no part of said donation has ever been paid to the Indiana and Illinois Central Railway Company or to this defendant, but that the said donation is now in the said county treasury and under the control of said board of commissioners, and is due and unpaid to this defendant; that Center township, Marion county, Indiana, claims to have some interest in said fund adverse to this defendant, but that it has no interest in said fund whatever."

It contains a further allegation that the railway company had complied with all the conditions upon which the donation was made.

Issues were made upon these pleadings by filing a general denial. The cause was tried by the court under an agreement that all matters of defence or counter claim, whether legal or equitable, might be given in evidence under the issues as then formed. The court made a special finding of facts, in which it was found, among other things, that Marion county had paid to Center township the sum of \$17,112.50 of this fund, and that the railway company had erected its principal machine shops in Center township, the latter being one of the conditions upon which the donation was made. Upon the facts found the superior court stated its conclusions of law in favor of Center township, and rendered judgment thereon; but, upon appeal to this court, the judgment was reversed, with directions to restate the conclusions of

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law, and render judgment in favor of the railway company. Upon return of the cause to the Marion Superior Court, judgment was rendered against Center township for costs, and against Marion county for the sum of \$85,000.

The judgment, on motion of the county, was so modified as to deduct therefrom the sum theretofore paid to the township, the decree so modifying the same containing the following stipulation and reservation, viz.: "Nothing in this order made, however, shall be in anywise construed as waiving, releasing or discharging any claim by either said Indianapolis, Decatur and Springfield Railway Company or said board of commissioners to recover of said Center township, Marion county, Indiana, any of the sums heretofore received by said Center township from said board of commissioners, but said rights, if any exist, are expressly reserved."

The township sought to have the special finding so modified as to strike therefrom so much as found that the railway company had located its principal machine shops in Center township, but its application for that purpose was denied.

The complaint in this case seeks to recover from Center township the amount of the donation paid over to it by Marion county.

To the complaint setting up the foregoing facts the township filed an answer consisting of six paragraphs.

The second paragraph avers that each of the *items* named in the complaint accrued more than six years before the commencement of this suit.

The third paragraph avers that the money for the recovery of which this suit is prosecuted was paid to the township more than six years before the filing of the *amended* complaint in the cause, and that it was paid with the knowledge of the appellant.

The fourth paragraph avers that the cause of action set up in the complaint in this cause was litigated and settled in the

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action between the township, Marion county and the railway company, set up in the complaint in this cause.

The fifth paragraph avers that the appellant is not entitled to recover the fund mentioned in the complaint, because it did not comply with the conditions upon which the donation was made, in that it did not locate its principal machine shops in Center township.

The sixth paragraph is the same as the fifth, with the additional averment that the special finding in the case of the appellee against Marion county and the railway company, to the effect that the principal machine shops of the appellant were erected in Center township, was made through the mutual mistake of the parties and the court trying said cause.

To these several answers the court overruled a demurrer, and carried it back, and sustained it to the complaint to which they were addressed.

The first question confronting us relates to the sufficiency of the complaint in the cause. The only objection urged against the complaint is that it affirmatively appears therefrom that the cause of action therein set forth was litigated and put at rest in the case of Center township against Marion county and the railway company. That this action settled the questions that the railway company had complied with the conditions upon which the donation was made, that it was entitled to the fund, and that the township had no legal claim thereto, is too plain for controversy. These were the actual questions in dispute between the township and the railway company. The township, in its complaint, alleged that the railway company was asserting an unfounded claim to the fund, and sought to estop it, while the railway company alleged, in its cross-complaint, that the township was asserting an unfounded claim to the same fund, and sought such judgment as would estop it.

This controversy was determined in favor of the railway company. *Board, etc., v. Center Tp.*, 105 Ind. 422; *Center Tp. v. Board, etc.*, 110 Ind. 579.

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It can not be denied that the judgment in favor of the railway company against Marion county for the fund, and against the township, bringing the action, for costs, forever estops the township from claiming any interest in the donation voted to aid in the construction of the railroad.

There is no allegation in the cross-complaint of the railway company upon which to base a money judgment against the township. As we have seen, the only allegations against the township are that it asserts an unfounded claim to the fund, and that it has no interest therein whatever. Looking to the cross-complaint alone, it could not be ascertained that any part of the money donated had been paid over to the township. It is evident, therefore, that the right of the railway company to a money judgment could not have been litigated and settled on this cross-complaint.

It is contended, however, by the appellee that the fund which the railway company sought to recover was indivisible, and that if the company elected to take less than the whole it can not sue for the remainder; and that, inasmuch as the parties agreed that all matters of defence and counterclaim might be given in evidence without further pleading, we must presume that all matters against the township were litigated and settled.

Were it not for the fact that the defendants to the cross-complaint had already divided the fund sought to be recovered, there would be much plausibility in the contention of the appellee that the fund was not divisible. 1 Herman Estoppel, 196; *Smith v. Gorham*, 119 Ind. 436; *Jarboe v. Severin*, 112 Ind. 572; *Indiana, etc., R. W. Co. v. Koons*, 105 Ind. 507; *Kurtz v. Carr*, 105 Ind. 574.

But the parties themselves had divided the fund. One portion was held by Marion county and another portion by Center township.

The title was in the railway company, but it could not recover that portion of the fund held by the county, in a suit against the township, and yet it will not be denied that it

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had the right to follow the funds in the township treasury. *Thorp v. Burling*, 11 Johns. 285; *Brownell v. Manchester*, 1 Pick. 232; Story Bailments, sections 52-102; *Younger v. Mills*, 20 Wis. 615; *Ingersoll v. Emmerson*, 1 Ind. 76; *Coffin v. Anderson*, 4 Blackf. 395; *Schindler v. Westover*, 99 Ind. 395.

The fund having been separated, the railway company had a right to a separate action against each, and this separation being an act of the county and township, without the consent of the owner of the fund, we do not think the appellee should be heard to say that such fund was not susceptible of division.

The contention that we should presume the cause of action set up in the complaint in this cause was litigated and settled under the agreement between the parties meets with an insurmountable difficulty in the judgment itself.

Such presumption might, perhaps, have been indulged if the judgment were silent upon the subject. But the record must be looked to as a whole, and when we so look to it, we find that the cause of action now in suit was expressly reserved, and was not settled in that action. This exception and reservation is binding on the parties. *Ulrich v. Drischell*, 88 Ind. 354.

It is true that the township was not a party to the motion of Marion county to modify the judgment, but if it had been a party to such motion, with the fund now sought to be recovered in its possession, it did not stand in a situation to insist that the county should account for it to the railway company.

In our opinion the complaint in this case states a cause of action against Center township, and the court erred in sustaining a demurrer thereto.

The court erred also, in our opinion, in overruling the demurrer to the second, third, fourth, fifth and sixth paragraphs of the answer.

Assuming that the six-years statute of limitations applies

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to the cause of action set forth in the complaint, each of the second and third paragraphs is defective. It is not averred in either that the cause of action did not accrue within six years next before the commencement of the action. The issue tendered as to when the *items* accrued is immaterial, the question being as to when the right to sue for the same became perfect. The items may have accrued at one time, and the right to sue for their recovery may have accrued at another. So the issue tendered in the third paragraph as to when the *amended* complaint was filed is immaterial, as the vital time is the commencement of the action.

What we have said in relation to the complaint disposes of the question arising on the demurrer to the fourth paragraph of answer.

It clearly appears by the record set out in the complaint that the appellee is estopped from pleading the matter set out in the fifth and sixth paragraphs of the answer.

It was alleged in the cross-complaint of the railway company that the conditions upon which the donation was made had been fully complied with. That was one of the issues to be tried on that cross-complaint, and the special finding shows that it was tried and determined. The question as to whether all the conditions upon which that donation was made have been complied with is forever foreclosed by the record made in that case. *Center Tp. v. Board, etc., supra.*

Judgment reversed, with directions to the Marion Circuit Court to overrule the demurrer to the complaint, and to sustain it to each of the second, third, fourth, fifth and sixth paragraphs of the answer.

ELLIOTT, J., took no part in the decision of this cause.

Filed Sept. 25, 1891; petition for a rehearing overruled Dec. 18, 1891.

The Midland Railway Company v. Stevenson, Constable.

No. 16,374.

THE MIDLAND RAILWAY COMPANY v. STEVENSON, CONSTABLE.

RAILROAD.—Levy of Execution on Locomotive.—Injunction.—An executive officer may levy upon and sell a locomotive upon an execution he holds against the railway company, and such company can not enjoin the sale.

From the Hamilton Circuit Court.

W. R. Crawford, W. S. Christian, J. R. Christian and W. A. Van Buren, for appellant.

W. R. Fertig and — *Alexander*, for appellee.

MILLER, J.—This action was instituted by the appellant against the appellee to enjoin him, as constable, from selling a certain locomotive and tender, owned by the appellant, and in actual use in its business.

It is claimed by the appellant that the property levied upon is not subject to levy and sale on execution, for two reasons: 1. That the locomotive and tender, being part of the equipment of the road, are, in effect, part of the realty, and not subject to sale by constables. 2. That the locomotive and tender, being a part of the equipment of the road in actual use, and essential to the performance of those duties which the appellant owes to the public, public policy forbids that they should be severed from the road to which they are appurtenant.

The view which we take of this case renders it unnecessary for us to enter upon the discussion of either of these vexed questions.

This action, it will be observed, was brought by the company, and not by mortgagees, bond-holders, or trustees representing the rights of creditors. It will also be noted that the complaint does not claim that the executions were not issued upon valid judgments, and for indebtedness of the

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company which it justly, and in good conscience, ought to pay; does not show but that it is abundantly able to pay them. Such being the case, the appellant has no standing in a court of equity, to ask its interposition to enjoin the collection of a debt which it is not unable, but simply unwilling, to pay. *Russell v. Cleary*, 105 Ind. 502; *Jones v. Ewing*, 107 Ind. 313; *Morrison v. Jacoby*, 114 Ind. 84; *Hewett v. Fenstermaker*, 128 Ind. 315.

If the railway company was insolvent, and this suit had been instituted by the trustees for the bond-holders, as was the case in *Titus v. Mabee*, 25 Ill. 232, and *Titus v. Ginhaimer*, 27 Ill. 462, a different question would be presented.

Judgment affirmed.

Filed Dec. 17, 1891.

No. 15,251.

THE AMERICAN CANNEL COAL COMPANY v. THE HUNTINGTON, TELL CITY AND CANNELTON RAILROAD COMPANY.

ASSESSMENT OF DAMAGES.—Majority Award.—In the assessment of damages occasioned by the taking of land by a railroad company, an appraisalment concurred in by two of the appraisers is sufficient.

SAME.—Assessment in Gross to Two Tracts Owned by One Person.—If a land-holder owns two or more tracts damaged, an assessment of damages in gross does not render the award liable to an exception to the effect that the damages to each tract ought to be itemized.

SAME.—Itemizing Damages.—In assessing damages to a tract of land the appraisers are not bound to itemize them.

SAME.—Qualifications of Appraisers.—Presumptions as to.—Failure to Show in Award.—In the absence of a specific averment to the contrary, it will be presumed that the appraisers possessed the necessary qualifications. The record need not affirmatively show that they were qualified.

From the Spencer Circuit Court.

A. H. Garland and *H. J. May*, for appellant.

J. E. Iglehart, *E. Taylor* and *W. Henning*, for appellee.

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MCBRIDE, J.—The appellee, a railroad corporation, appropriated for the purposes of its road-bed, depot, station, shops, etc., certain land belonging to the appellant. The appropriation was made pursuant to the provisions of sections 3906, 3907, R. S. 1881.

Error is assigned on the action of the circuit court in sustaining demurrers to certain exceptions filed by the appellant to the award of the appraisers.

The first exception is as follows: "Because the appraisers did not agree upon any award, but two of them fixed the amount of the damages at \$300, and the other one at \$1,438, so that there was no agreement of the said appraisers."

This exception proceeds on the theory that the award of the appraisers in appropriation proceedings, like the verdict of a jury, must be agreed to by all of the appraisers to be valid.

Unanimity among the appraisers is not required.

An appraisement concurred in by two is sufficient. Section 240, clause 2, R. S. 1881; *Piper v. Connersville, etc., T. P. Co.*, 12 Ind. 400; *Cicero, etc., Co. v. Craighead*, 28 Ind. 274; *Hays v. Parrish*, 52 Ind. 132; *Scraper v. Pipes*, 59 Ind. 158.

The third exception is as follows: "Because it does not state the separate value of the parts of the lots taken, nor the separate value of the parts of the street taken, nor the separate value of the land from which the strip is appropriated."

The land sought to be appropriated is a strip forty feet wide, extending across two lots, both belonging to the appellant, and a strip twenty feet wide off a street on which the lots abut, the portion of the street appropriated being adjacent to the lots. The objection, it will be observed, is not that the appraisers did not separately consider the effect of the appropriation upon the several tracts, but that in their award they did not itemize the damages. The court did not

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err in sustaining the demurrer to this exception. While it was the duty of the appraisers to consider all of the effects of the proposed appropriation on each tract of land affected, they were not required to itemize and separately state the damages to each tract. An award of a sum in gross covering all of the damages to all of the several tracts was sufficient.

The fourth exception is as follows: "Because it is not shown upon the face of the proceedings that the appraisers or arbitrators were qualified under the law, In this, that it is not shown by such proceeding that such appraisers or arbitrators did not own land within one mile of any part of the said railroad for which the said strip of land is appropriated."

This exception contains no allegation that either of the appraisers was disqualified. The only objection is that the record does not affirmatively show that they were qualified.

In the absence of any specific averment to the contrary it will be presumed that the appraisers possessed the necessary qualifications. *Turpin v. Eagle Creek, etc., G. R. Co.*, 48 Ind. 45.

If they did not, that fact must be averred and proven by the party attacking the award.

The fifth and sixth exceptions present the same question. Both allege that it is not shown by the award that the appraisers considered the damages that might accrue to the appellant because of certain specific facts.

The objection is not to what the appraisers did, or failed to do, but to the form of the award. That it does not affirmatively appear from the award that the appraisers considered and awarded damages because of increased danger from fire, because of damage to storage, wharfage, etc.

The appraisers were required to consider and to award compensation for all damages of every character which would be sustained by the appellant by reason of the appropriation of the land to the uses contemplated. They are not, however, required to itemize their award and show how much

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they allow for increased danger from fire, how much for noise, how much for smoke and cinders, how much for broken rest, etc. It is sufficient if, having fully and fairly considered *all* of the effects of the proposed appropriation, they award a sum in gross sufficient to compensate the owner of the land.

In our opinion the court did not err in its rulings on any of the questions presented.

Judgment is affirmed, with costs.

Filed Jan. 5, 1892.

No. 15,099.

MORGAN ET AL. v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

PLEADING.—Title.—Special Pleading.—In pleading title, a general averment must yield to a specific one, and if the specific allegations do not show title the complaint is bad.

SAME.—Anticipating Defence.—If the plaintiff undertakes to anticipate a defendant's defence, he must effectually show that such defence is insufficient.

BOUNDARIES.—Pleading to Establish.—A complaint to establish a boundary is bad if it does not contain an allegation of a previous request to establish such line.

DAMAGES.—Pleading Must Show.—In a complaint to recover damages to land, the value of the land before and after the injury, or the amount of the damages, must be stated.

RAILROAD.—Ejectment.—Ejectment will not lie against a railway company to recover land on which its road is located and operated after public rights have intervened.

From the Lake Circuit Court.

E. Roby, T. J. Wood and M. Wood, for appellants.

J. H. Baker, for appellee.

ELLIOTT, C. J.—The complaint alleges that the appellants

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are the owners of the land therein described ; that they derive title through the act of Congress commonly called the "Swamp Land Act," and through conveyances made by the State and by other owners ; that the Buffalo and Mississippi Railroad Company was incorporated by an act of the General Assembly of Indiana, approved February 6th, 1835 ; that section 1 of the act provides that "the corporation shall have power to examine, survey, mark and locate the route of said railroad for a single or double track with full power to diverge from a direct line when more favorable ground can be had for the construction of said road, the same not to exceed eighty feet in width ;" that an act passed in January, 1846, authorized the company named in the act of 1835 to consolidate with other railroad companies ; that in 1853 that company did consolidate with other companies and located a line for a single track ; that the single track constructed in 1853 was located 562 feet north of the present track ; that afterwards the company constructed the track now in use, and this track is more than 200 feet from the original track ; that the track last mentioned was constructed in 1854 ; that the width of the track, as constructed, was sixteen feet ; that the company did not obtain a grant of the right of way, nor was it appropriated under the right of eminent domain ; that in 1854 the defendant, as the successor of the former company, wrongfully built another track by the side of the track constructed in 1854 without the consent of the plaintiffs, and without paying them any compensation ; that the defendant claims the right to occupy the land used by it for a single track from 1854 continuously to the present time by virtue of the statute of limitations of the State of Indiana, and that it has been in actual, open, adverse possession of the strip of land for more than twenty years.

It is very difficult to give a construction to the complaint. It contains much that should not be pleaded, and its general frame makes it almost impossible to determine upon what

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theory it proceeds or what its character is. Counsel claim that if it is good as a complaint for possession or as a complaint to establish boundaries, or as a complaint for the recovery of damages, it will repel a demurrer. This position is not tenable. It is, of course, well settled that a complaint will repel a demurrer if it entitles the plaintiff to some relief, although not to all the relief demanded. *Bayless v. Glenn*, 72 Ind. 5. But the rule stated does not by any means warrant the conclusion that a plaintiff may present one case and recover on another, as, for instance, frame a complaint in ejectment, and upon it obtain an injunction. *Mescall v. Tully*, 91 Ind. 96; *Western Union Tel. Co. v. Young*, 93 Ind. 118; *First National Bank v. Root*, 107 Ind. 224.

But waiving this point and construing the complaint as appellants assert it should be construed, we will decide the main questions in the case.

Two prefatory observations are necessary :

First. The complaint pleads the title of the plaintiffs specifically, and the general averments must yield to the specific allegations, so that if the specific allegations do not show title he will fail. *Reynolds v. Copeland*, 71 Ind. 422.

Second. The plaintiffs have undertaken to anticipate the appellee's defence, and although they were not bound to anticipate the defence, yet, having assumed to do so, they must effectually show that the defendant's defence is insufficient.

The claim that the complaint is good as a complaint to establish boundaries is disposed of by declaring that there is no allegation in the complaint that the defendant was ever requested to establish the lines. A party can not be harassed by a suit in such a case unless there has been a precedent request. It may also be added that there are no facts averred which present an issue as to boundary lines, nor any such descriptions given as would enable the court to establish the lines.

The claim that the complaint is good as a complaint for

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damages is not supported, because the value of the land is not given nor the extent of the injury stated. It may be that nominal damages can be inferred, but a judgment will not be reversed to give a party an opportunity to recover nominal damages.

The claim that the complaint is good as a complaint in ejectment can not be sustained, because ejectment will not lie to recover the land on which a railroad is located and operated after public rights have intervened. *Kincaid v. Indianapolis, etc., Co.*, 124 Ind. 577; *Louisville, etc., R. W. Co., v. Beck*, 119 Ind. 124; *Louisville, etc., Co. v. Soltwedde*, 116 Ind. 257; *Bravard v. Cincinnati, etc., R. R. Co.*, 115 Ind. 1; *Sherlock v. Louisville, etc., R. W. Co.*, 115 Ind. 22; *Midland R. W. Co. v. Smith*, 113 Ind. 233; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581, and cases cited; *Porter v. Midland R. W. Co.*, 125 Ind. 476; *Strickler v. Midland R. W. Co.*, 125 Ind. 412; *Midland R. W. Co. v. Smith*, 125 Ind. 509.

It is evident that the specific facts stated do not show a title sufficiently strong to destroy the defence attempted to be anticipated.

Judgment affirmed.

Filed Oct. 6, 1891; petition for a rehearing overruled Dec. 18, 1891.

 No. 15,391.

RYDER, BY NEXT FRIEND, v. HORSTING ET AL.

HIGHWAY.—Collateral Attack on Proceedings.—Presumption.—In a collateral attack on a highway proceeding, the presumption is that such proceeding is not void.

SAME.—Notice of Establishment.—The establishment of a highway without notice to the land-owner affected, his agent or occupant, is void.

SAME.—Injunction.—A complaint to enjoin the opening of a highway through the plaintiff's land for want of notice must contain an aver-

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ment that neither he nor his agent nor the occupant thereof had such notice.

COUNTY COMMISSIONERS.—*Presumption as to Jurisdiction*.—The presumption is in favor of the jurisdiction of the commissioners' court, and the regularity of their proceedings, where a collateral attack is made upon the same.

From the Knox Circuit Court.

W. C. Johnson, for appellant.

W. A. Cullop and C. B. Kessinger, for appellees.

MILLER, J.—This was an action by the appellant against the appellees for an injunction.

The complaint shows that the appellant was the owner of a tract of enclosed land in Knox county, and a resident and tax-payer thereof; that at the March term of the commissioners' court of said county, preceding the filing of her complaint, a petition was filed in said court for the opening of a highway through her land; that in the petition she was not named or set forth as one of the owners of said real estate, nor was the name of her authorized agent, or guardian, mentioned therein, nor was the real estate described as the property of persons unknown to the petitioners; that no notice of the filing of the petition was ever given to her, her agent, or guardian, and that neither she, nor her agent or guardian, had notice that the petition had been filed, or was for hearing in said court; that at said term of the commissioners' court an order was made by the court directing the opening of the highway; that the order did not set out or contain the name of the plaintiff, her agent or guardian, or in any way intimate that she was connected with, or interested in, the same; that she did not appear in such proceedings, either in person or by her guardian, agent or attorney; that the defendants, one of whom is the township trustee, and the other the road supervisor, are proceeding under said order to tear down her fences, and expose said lands to depredation, to her damage in the sum of five hundred dollars. Wherefore she asks that they be enjoined.

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A demurrer was sustained to this complaint, and final judgment rendered against her for costs. The sufficiency of this complaint is the only question before us.

This being a collateral attack upon an order of the commissioners' court, made in a matter presumptively within their jurisdiction, must fail unless the proceedings are so defective as to be void. *McDonald v. Payne*, 114 Ind. 359.

The commissioners' court having ordered the opening of the highway, necessarily passed upon the facts necessary to acquire jurisdiction. In *Elliott on Roads and Streets*, 219, it is said: "The judgment of an inferior court upon jurisdictional facts is generally regarded as conclusive; and where there is a judgment necessarily affirming that jurisdiction exists, and this judgment could not have been pronounced without passing upon jurisdictional facts, it will be conclusive as against all collateral attacks." *Rassier v. Grimmer*, *post*, p. 219; *Lamb v. Cain*, 129 Ind. 486.

Without notice there could be no jurisdiction. *Lewis Eminent Domain*, section 364.

It may now be considered settled that, in a petition for the location of a highway, the names of the owners, occupants, or agents, must be set forth. *Hays v. Campbell*, 17 Ind. 430; *Hughes v. Sellers*, 34 Ind. 337; *Wild v. Deig*, 43 Ind. 455; *Meyers v. Brown*, 55 Ind. 596; *Porter v. Stout*, 73 Ind. 3; *McIntyre v. Marine*, 93 Ind. 193.

In *Porter v. Stout*, 73 Ind. 3, the statute (now sections 5001, 5015) was construed, and it was held that the provisions of the act were complied with by making either the owner, the agent, or the occupant, a party. In that case it is said: "The language plainly indicates this, for, in legal effect, it is precisely the same as if the words were, 'shall set forth the names of the owners, or the names of the occupants, or the names of the agents.' Unless we do violence to the language used, we must hold that the statute requires that one of the three persons designated—the owner, the occupant, or the agent—shall be named, but that it does not require that

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the owner of, the occupant of, and the agent for the same land shall all be named in the petition."

This case must be decisive of the one before us, for with all the care taken to charge that neither the appellant, her agent nor guardian, nor any owner of the property unknown to the petitioners, were named in the petition, nor that either of them had notice, or knowledge, of the proceedings, no allegation whatever concerning the "occupant" is found in the complaint. The omission seems significant.

We are to presume in favor of the jurisdiction of the commissioners' court, and the regularity of their proceedings, where a collateral attack is made upon the same.

It may well be that every statement in the complaint is true, and yet the jurisdiction of the court be complete to order the opening of the highway through the lands of the appellant.

In aid of the presumption in favor of the action of the commissioners' court we must, upon a collateral attack, infer that the lands of the appellant were occupied by some one as tenant, or otherwise, and that such tenant was made a party to the proceedings, and duly notified. Had the complaint disclosed the fact that at the time the proceedings in the commissioners' court were instituted the appellant was the sole occupant of the land, or that the occupant, if there was such, was not made a party, a different question would be presented.

In *Kimmey's Case*, 5 Harr. (Del.) 18, it was held that in a petition for a public road, a law requiring a notice to the owner or holder of the land was complied with by serving a notice on any person occupying, or in possession of the land, placed there by the owner, and such occupant need not be a tenant.

The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed Jan. 5, 1892.

Anderson School Township v. Milroy Lodge F. and A. M., No. 139.

No. 15,289.

ANDERSON SCHOOL TOWNSHIP v. MILROY LODGE F. & A.
M., No. 139.

PARTITION.—*Building Erected Under Agreement that One Person Should Own the Upper and Another the Lower Story.*—There can be no partition of a building as between the parties where it is built under an agreement to the effect that the first story and the ground should be owned by one of them and the second story by the other, with a right of egress and ingress over such ground for the owner of the upper story.

From the Rush Circuit Court.

B. L. Smith and *C. Cambern*, for appellant.

W. A. Cullen, *J. D. Megee*, *D. S. Morgan* and *D. Morris*,
for appellee.

ELLIOTT, C. J.—The appellant alleges in its complaint that it is the owner of the real estate in controversy, and prays partition. The substance of the answer of the appellee is this: The appellee agreed with the appellant and another person to purchase the land in dispute and to erect a building thereon; that the first story of the building should be owned and used by the appellant, the second story by the third person referred to, and that the third story should be owned and used by the appellee; that the appellant should have the control of the ground subject to the appellee's right of ingress to and egress from its part of the building.

It seems very clear to us that the answer shows that the appellant has no right to partition. The erection of the building under the agreement vested the appellee with a right of access to its part of the structure, and of that right it can not be deprived. Partition can not be effected without destroying that right, and hence partition can not be decreed. But this is not the only reason why the appellant is not entitled to partition, for there is this additional reason, namely, each party owns its part of the building in severalty. As

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each party owns its part of the property in severalty, it is legally impossible that partition can be awarded, for there is no community of interest. The case is against the appellant upon principle and authority. *McConnell v. Kibbe*, 43 Ill. 12; *Soutter v. Atwood*, 34 Maine, 153 (56 Am. Dec. 641); *Russell v. Beasley*, 72 Ala. 190; *Baldwin v. Humphrey*, 44 N. Y. 609; *Appeal of Latshaw*, 122 Pa. St. 142; Freeman Co-Tenancy and Partition, section 87; Knapp Partition, 39, 40.

The agreement as to the construction, ownership and use by the parties of different parts of the building is not made voidable by the statute of frauds. In support of this proposition it is sufficient to say that the agreement was fully performed and possession taken, although other reasons might be assigned for our conclusion.

The finding is well supported by the evidence.

Judgment affirmed.

Filed Dec. 19, 1891.

No. 15,336.

MARTIN v. THE TOWN OF ROSEDALE.

TOWN.—Peddler's License.—Ordinance Requiring.—Sale by Sample of Foreign Goods.—Interstate Commerce.—An ordinance of a town of this State requiring all travelling peddlers of goods to take out a license is not void on the assumption that it applies only to non-residents of such town, for it equally applies to citizens thereof; but it is void as to residents of other States who are engaged in selling goods located in such other States, even though the sale is only by sample, on the ground that it is an interference with interstate commerce.

From the Parke Circuit Court.

D. H. Maxwell and *H. Maxwell*, for appellant.

E. Hunt, for appellee.

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COFFEY, J.—Section 826, Elliott's Supplement, confers upon incorporated towns in this State the power to license, regulate or restrain the business of travelling peddlers. Under the power thus conferred the town of Rosedale, in Parke county, duly passed an ordinance making it unlawful for any travelling peddler to ply his avocation within the corporate limits of the town, without first procuring a license so to do, and fixing a penalty for its violation.

In the month of February, 1889, the appellant, who is a resident of the State of Illinois, without having first procured a license, was found selling goods, by sample, in the town of Rosedale, and travelling from house to house for that purpose. He was the agent of Loverin & Co., of the city of Chicago, and the samples exhibited by him belonged to that company. The goods sold by the appellant were to be delivered by the company, the appellant acting as their agent in soliciting and taking orders.

He was prosecuted for violating this ordinance, and was convicted, from which conviction he appeals to this court, calling in question the validity of both the ordinance and the statute under which it was passed.

It is contended that the ordinance in question discriminates in favor of citizens of the town of Rosedale and against those who do not reside in the town, and is for that reason void. The contention is based upon the assumption that one who resides in the town and peddles goods therein from house to house is not a travelling peddler, and in this respect may enjoy a privilege under this ordinance not enjoyed by one who does not reside in the town.

This involves the construction of the ordinance before us. The object to be attained in construing a statute or ordinance is to ascertain, if possible, the intention of those who enacted it. For that purpose the court should first ascertain, if it can do so, the evil intended to be remedied or prevented, and should so construe the statute or ordinance, if it

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is susceptible of such construction, as to render it effectual for the purpose intended.

In the case of *Graffy v. City of Rushville*, 107 Ind. 502, it was said by this court that one of the objects sought to be attained by statutes and ordinances of the kind now under consideration was to prevent the indiscriminate invasion of the houses and places of business of citizens, and shield them from the practices of itinerant traders of unknown repute, who are frequently patronized by persons in order to be rid of their importunities and presence.

It is impossible to conceive of a "peddler," in the ordinary acceptation of that term, disconnected from the idea of "travelling" from house to house for the purpose of vending some article of merchandise. "The leading primary idea of a hawker and peddler is, that of an itinerant or travelling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business."

"A peddler, petty chapman, or other trading person going from town to town or to other men's houses, and travelling either on foot, or with horse or horses, or otherwise carrying to sell, or exposing to sale, any goods, wares, or merchandise." *Graffy v. City of Rushville, supra*; *Commonwealth v. Ober*, 12 Cush. 493; *Rapalje and Lawrence Law Dictionary*, Tit. "Hawker."

As it was the purpose of the ordinance under consideration to prevent or to restrain the indiscriminate invasion of the houses and places of business of the citizens of Rosedale, and to shield them from the practices of itinerant traders and the annoyances incident thereto, we think the term "travelling peddler" was intended by those who passed the ordinance in question to apply to all who travelled from house to house in the town for the purpose of vending merchandise, without regard to their place of residence. To all such

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persons, whether they reside in the town or elsewhere, we think the ordinance applies.

It is not, therefore, subject to the objection that it discriminates in favor of the citizens of Rosedale and against those residing in some other locality.

The appellant was a travelling peddler within the meaning of the ordinance.

That the regulation of the business of a peddler is a proper matter for the exercise of the police power is not now open to question in this State. The State, having the power to regulate, may delegate its power to municipalities. In the case of *City of Huntington v. Cheesbro*, 57 Ind. 74, it was said by this court: "The city had power to pass an ordinance requiring a license for peddling in the city. * * * We are not aware that such an ordinance violates any provision of the State or Federal constitution."

So in the case of *Graffy v. City of Rushville*, *supra*, it was said: "On the other hand, where by the terms of a law or ordinance regulating the sale of goods by hawkers or peddlers, the privilege is equally open to all upon the same terms, and the license fees imposed for the privilege are the same regardless of the State or district wherein the goods are manufactured or produced, such law or ordinance is a legitimate exercise of power, and will be upheld."

Under these authorities we are constrained to hold that the ordinance in question, when applied to the citizens of the State or to merchandise in the State at the time of sale, is valid.

It is contended, however, that the ordinance, when applied to merchandise not in the State, owned by citizens of another State, and sold in this State by sample, is an interference with interstate commerce, and, as to such merchandise, is void.

The case of *McLaughlin v. City of South Bend*, 126 Ind. 471, is decisive of the question here involved.

In that case it was said: "The negotiations concerned

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goods in another State, there owned and held for sale, and such negotiations must be regarded as affecting interstate commerce, and, thus regarded, it must be held that they can neither be prohibited nor regulated by the State or its municipalities."

In this case the appellant was a citizen of another State, representing merchants in the State of Illinois, whose goods were located in the city of Chicago, and for these reasons the case falls clearly within the rule laid down in the case cited, and the decisions of the Supreme Court of the United States upon which it rests. It follows that the ordinance under consideration can not be made to apply to him under the facts above stated.

Judgment reversed, with directions to the circuit court to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed Dec. 18, 1891.

No. 15,377.

HORTON v. BROWN.

BOUNDARIES.—Settlement of by Agreement After Survey Made.—Evidence of on Appeal.—If the parties affected, after a survey is made, and during the time they have the right to appeal therefrom, mutually agree on a line between their properties, and yield possession of land to which they claim title to each other, and set posts and move their fence to the agreed line, they thereafter are estopped to deny that the agreed line was the boundary line; and on appeal from such survey such agreement may be given in evidence as a complete defence.

PRACTICE.—Irrelevant Cross-Examination Showing Defence without Objection.—Witness Recalled and Objection Interposed for First Time.—If a plaintiff permits, without objection, a defendant to go into his defence on cross-examination of the former's witness, he can not thereafter object when such witness is recalled and additional questions relating to such defence are propounded to him. It is then too late to object.

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From the Switzerland Circuit Court.

J. T. Ellis and *F. M. Griffith*, for appellant.

W. D. Ward and *J. A. Van Osdal*, for appellee.

MILLER, J.—This was an appeal by the appellant from a survey to the circuit court. In that court an answer and cross-complaint were filed by the appellee, but subsequently the same were, on motion of the appellant, struck out. A trial before a jury resulted in a verdict and judgment for the appellee.

The questions we are called upon to consider are raised by the rulings of the court in admitting evidence, over the objections of the appellant, and in giving certain charges to the jury, and refusing to give others relating to the same questions of law ruled upon in the admission of evidence.

The parties were, respectively, the owners of several adjoining tracts of land bounded by the line, a portion of which is in dispute. By mutual agreement a survey to establish the boundary line was made by the county surveyor, both parties being present and assisting in making it. This appeal was taken nearly three years after the making of the survey.

The dispute on the trial as to the correctness of the survey appealed from was with reference to that portion of the line between two forty-acre tracts of land, being the north end of the line surveyed.

The evidence shows that the land along this line is very rough and hilly, and that no two of the several surveys made of the disputed lines are in exact agreement.

On the trial of the cause the court, over the objection of the appellant, permitted the defendant to show that after the making of the survey appealed from the parties were dissatisfied with the line marked out, and called in three of their neighbors to assist them in establishing an agreed boundary line; that a line on the south end of the surveyed line was staked off by the appellant, which gave to the appellant a

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portion of the land claimed by the appellee ; that it was then agreed by both parties that each one was to hold the land on his side of the new line, thus marked out, and that this should settle all disputes between them as to their boundary lines ; that afterwards the appellant took possession of the land given him by the new boundary line, and continued to hold the same at the time of the trial, the parties having set posts and moved their fences to the agreed line.

The appellant objected to the introduction of this evidence :

1st. Because the plaintiff, by his attorney, had stated, in open court, in the presence of the jury, that the only line in controversy was the north end of the line, between the two forty-acre tracts, and that he was making no claim to any part of the line south of these tracts ; and that the evidence offered related solely to a settlement of the line south of them, and in no way tended to establish the correctness of the line in dispute.

2d. That the evidence was wholly irrelevant and immaterial.

No objection seems to have been made to the evidence on account of the absence of any pleading setting up the matter proposed to be proven, and this may be accounted for by the fact that such pleadings had been, on motion of the appellant, stricken from the files of the court.

The appellant contends that the only question for trial was the correctness of the survey appealed from, and that questions of ownership, possession, or agreements concerning the disputed boundaries are foreign to the issues.

We think this comes within the reason of the rule laid down in *Wingler v. Simpson*, 93 Ind. 201, where it was held that evidence of occupancy under a claim of title, for more than twenty years to a line, different from that fixed by the survey, was admissible. In that case the claim was made that such evidence would be proper in actions in ejectment or to quiet title, but not on appeal from a survey. The court says :

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"There can be no good reason for establishing a survey that is immediately liable to be set aside by an action in ejectment or a suit to quiet title." This case was cited and approved in *Cleveland v. Obenchain*, 107 Ind. 591.

If, as claimed by the appellee, the parties during the time in which they had the right to appeal from the survey adjusted their disputes concerning their boundaries and mutually yielded the possession of land to which they claimed title to the other, and set posts and moved their fences to the agreed line, they were thereafter forever estopped to deny that this was the true boundary line. *Cleveland v. Obenchain*, *supra*; *Pitcher v. Dove*, 99 Ind. 175; *Hills v. Ludwig*, 46 Ohio St. 373; *Bobo v. Richmond*, 25 Ohio St. 115; *Walker v. Devlin*, 2 Ohio St. 593; *Gwynn v. Schwartz* (W. Va.), 9 S. E. Rep. 880; *Silvarer v. Hansen*, 77 Cal. 579; *Atchison v. Pease*, 96 Mo. 566; *Schad v. Sharp*, 95 Mo. 573.

If such boundary line was fixed by an arrangement that bound the parties, no good reason can be given why they should thereafter, in any manner, test the correctness of a survey that had been superseded by an agreed line.

It is of more importance that adjoining proprietors should summarily adjust questions of disputed boundaries, than that rigid rules of practice and pleading on appeal from surveys should be adhered to.

The evidence was not objectionable on account of want of relevancy to that portion of the line, the correctness of which the appellant disputed. The settlement, if the evidence of the appellee is true, embraced the whole line, including that in dispute, and it was therefore material.

Some objections are made to a portion of the cross-examination of the appellant, on the ground that it related to matters about which he had not been examined in chief. We find that the witness, in his original cross-examination, went into the matters complained of without any objection being made to his testimony; toward the close of the plaintiff's evidence he was recalled and examined a second time in his

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own behalf, when the defendant propounded some additional questions to him, when objection was made to the evidence.

This came too late. If the appellant did not desire the defendant to go into his part of the case on cross-examination, he should have made his objections at the outset.

We are also of the opinion that the witness in his direct examination went sufficiently into the case to lay a foundation for the cross-examination.

The objections to the charges given, and to those refused, related to the matters that have been discussed, and embraced the same propositions of law involved in the rulings in the admission of evidence.

The evidence was sharply conflicting upon most of the material facts involved in the controversy, including the nature of the agreement entered into by the parties at the time they met to adjust the disputes between them with reference to the disputed boundary. The court submitted this question fully and fairly to the jury, and we can not disturb their finding.

The judgment is affirmed.

Filed Dec. 19, 1891.

No. 16,121.

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CLARK, EXECUTOR, v. HELM ET AL.

ADVANCEMENT.—Will.—Equal Distribution.—Interest.—Unduly Advanced Distributees.—Refunding.—Where a will shows that it was the intention of the testator to make an equal distribution of his estate, and some of the distributees have received more than the others, the latter are entitled to a sum sufficient to put them on an equal footing with the former, with interest thereon, in addition, from the date of the testator's death until payment made, if there are sufficient assets for that purpose left after the payment of the debts of the deceased and the costs of administration; but the distributees who have received greater amounts than their co-distributees can not be made to refund in order to bring about such equalization.

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From the Rush Circuit Court.

W. J. Henley and Lot D. Guffin, for appellant.

B: L. Smith and C. Cambern, for appellees.

ELLIOTT, C. J.—The ancestor of the appellees and the testator of the appellant, Clark, died on the 15th day of January, 1888, leaving a large estate. The testator in his will directed that the executor should convert the notes and accounts held by the testator at the time of his death into money, with which, with other money, he should equalize the shares of the respective heirs. During his lifetime the testator made the following advancements to his children: To William Helm \$28,000, to Florence Cutter \$24,490, to Elizabeth Patterson \$24,300, and to his grandchildren the following advancements: To Nannie, George and Bertha Helm \$20,050.

The court adjudged that the shares of the distributees should be equalized, and that Florence Cutter was entitled to receive \$3,510 in addition to the sum advanced to her; that Elizabeth Patterson was entitled to the additional sum of \$3,700, and Nannie, George and Bertha Helm were jointly entitled to the additional sum of \$7,950, and that they are also entitled to interest on the sums to which they are respectively entitled to from the 15th day of January, 1888, to be paid before any more money is distributed to William Helm. The contest in the case is as to the allowance of interest to the distributees who had received a less sum than that advanced to William Helm.

It is very doubtful whether the question argued by counsel is presented. It certainly does not arise on the pleadings, for the complaint is unquestionably good in so far as it asks that the shares be equalized, and if good to that extent will repel a demurrer, even if it should be conceded that it claims too much in claiming interest. *Bayless v. Glenn*, 72 Ind. 5. Nor does the motion for a new trial properly present the question, inasmuch as there is no specification prop-

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erly challenging the allowance of interest. Neither does the exception to the finding properly present the question, for there is no special finding in the record. But, as the appellees' counsel interpose no objection to the mode of presenting the question, and as the case is a peculiar one, we have thought it best to decide the main question.

Upon the general question whether a distributee can be allowed interest after the death of the ancestor, there is stubborn conflict of authority. *Davies v. Hughes*, 86 Va. 909; *Appeal of Patterson*, 128 Pa. St. 269; *Yundt's Appeal*, 13 Pa. St. 575; *Jackson v. Jackson*, 28 Miss. 674; *Black v. Whitall*, 1 Stock. Ch. 572; *Kyle v. Conrad*, 25 W. Va. 760; *Roberson v. Nail*, 85 Tenn. 124; *McDougald v. King*, 1 Bailey (S. C.), 147; *Stewart v. Stewart*, L. R. 15 Ch. Div. 539 (545); *Steele v. Frierson*, 85 Tenn. 430; *King v. Talbot*, 40 N. Y. 76; *Johnson v. Patterson*, 13 Lea 626; *Williams v. Williams*, 15 Lea 438.

Our own court has given its sanction, in a general way, to the doctrine that interest may be allowed after the death of the ancestor, although the question was not expressly decided. *Case v. Case*, 51 Ind. 277. Judge Woerner asserts that interest should be allowed. 2 Woerner Law of Administration, 1222. But in this instance we are not required to enter the field of conflict, for we think that the will of the testator so influences the case as to make it our duty to hold that the distributees are entitled to interest. Our opinion is that the testator intended that all the heirs should receive an equal share of his estate, and that it was his purpose to impose upon the executor the duty of equalizing the distribution. The will expresses the purpose of the testator to divide his estate into four shares, and to allot to the persons respectively entitled to distribution an equal share. This intention will be defeated unless the appellees are allowed interest from the time of the testator's death. The use of money is valuable, and the right to interest is property, so that William Helm has had more than his share of the estate, in-

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asmuch as he has had the use of the excess advanced to him. It is, therefore, equitable and just under the terms of the will that the other distributees be put upon equality with him by being allowed interest from the time of the testator's death. The appellees can not, of course, recover anything directly from William Helm, for our statute precludes such a recovery. Section 2407, R. S. 1881. Nor do they ask a recovery of that kind. What they asked, and the court awarded, is that before distributing anything more to William Helm interest shall be added to their respective claims. This we think they had a right to ask and receive.

We may add, to prevent misunderstanding, that we do not hold, nor mean to hold, that they can be allowed interest unless there is money remaining for distribution. They can not have interest at the expense of creditors of their ancestor, but they may have interest added to their claims if there is money to be distributed; and, while nothing can be recovered from William Helm, he may, nevertheless, be put off as to further payments to him in order to enable the executor to equalize the shares of the appellees by allowing them interest from the time of the testator's death. This is nothing more than an equitable distribution under the will of the testator, and the conclusion asserted does not violate any rule of law.

Judgment is affirmed.

Filed Jan. 5, 1892.

130	120
133	698

130	120
148	167
151	273

No. 16,122.

KIMBERLIN v. THE STATE, EX REL. TOW.

OFFICER.—Successor.—Who May Select.—Holding Over.—Where an officer is lawfully elected and in the possession of an office his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which he owes his election, or which by law is entitled to elect his successor.

SAME.—Death Before Qualification.—Vacancy.—No vacancy occurs in an

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office where the person elected to fill it dies before he qualifies, or even dies after the polls are closed and before the result is ascertained.

SAME.—Death of Candidate After Polls Closed and Before Result Ascertained.

—If a candidate dies after the polls are closed and before the result is ascertained, yet if he has received a majority of the ballots he is duly elected. In such an instance no vacancy occurs in the office, and it can not be filled by appointment.

SAME.—Appointment when no Vacancy.—An appointment to fill a vacancy in an office is void when there is no vacancy.

TOWNSHIP TRUSTEE.—Death of Candidate After Close of Polls and Before Result Ascertained.—Election in November.—Vacancy.—Appointment.—A.

was a township trustee. At an April election B. and C. were opposing candidates for the office. After the polls closed and before the result was announced B. died. On completion of the count it was found that B. had received a majority of the ballots. At the following November election D. and A. were opposing candidates for the office, and D. received a majority of the ballots, was declared elected, and filed his bond as such trustee. In the following December the board of county commissioners declared that there was a dispute concerning the validity of the election, and appointed D. trustee, but he filed no new bond and took no steps to qualify under this appointment.

Held, that no vacancy had ever occurred in the office; that the election of November was void, and that C. was the legal trustee of the township, holding over until his successor had been duly elected and qualified.

ELECTION.—Held at Time not Authorized by Law.—The election of an officer at a time not authorized by law (as a township trustee at the regular November election) is void.

From the Lawrence Circuit Court.

M. F. Dunn, G. G. Dunn and W. K. Marshall, for appellant.

J. H. Willard, for appellee.

COFFEY, J.—The appellee, William H. Tow, was duly elected trustee of Marion township, Lawrence county, at the regular township election in the year 1888, duly qualified and entered upon the discharge of his duties as such, and is yet in the possession of the office, claiming title thereto.

At the April election in the year 1890, James H. Brown and Henry Murray were opposing candidates for the office of township trustee in Marion township, and after the votes had all been cast and the polls closed, and while the election

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officers were engaged in counting the ballots, but before the result of the election had been ascertained or declared, Brown suddenly and instantly fell dead. When the count was completed it was ascertained that Brown had received a majority of the votes cast for township trustee of Marion township. At the November election, in the year 1890, the appellant, Hugh L. Kimberlin, and the appellee were opposing candidates for the office of township trustee of Marion township; each took a part in the election and each voted for himself. The appellant was by the proper election officers declared duly elected, and, receiving his certificate of election, he qualified and filed his bond, as such trustee, to the approval of the county auditor, on the 13th day of November of that year. On the 17th day of December, 1890, the board of commissioners of Lawrence county, being in special session, entered an order reciting that there was a dispute as to who was elected township trustee of Marion township, and thereupon appointed the appellant as such trustee, but it does not appear that he filed any new bond or took any steps to qualify under this appointment. On the day of this appointment the auditor of Lawrence county issued to the appellant a warrant for the township funds belonging to Marion township, upon which he drew the funds from the county treasury, whereupon the appellee instituted proceedings in the Lawrence Circuit Court to enjoin him from acting as such trustee, in which he was successful. The appellant acted as such trustee for the period of five days before he was thus enjoined.

Each of the parties to this suit claims to be the legal trustee of Marion township, the appellant basing his claim upon the election held in November, 1890, and his subsequent appointment by the board of commissioners of Lawrence county, while the appellee bases his claim upon the alleged fact that his successor has never been elected and qualified, and that he has the right to such office until that event takes place.

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The questions presented for consideration involve the construction of section 3, article 15, of the State Constitution, and some consideration of the provisions of section 5527, R. S. 1881.

Section 3, article 15, *supra*, provides that "Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

Section 5527, *supra*, provides "If any officer of whom an official bond is required shall fail, within ten days after the commencement of his term of office and receipt of his commission or certificate, to give bond in the manner prescribed by law, the office shall be vacant."

It is contended by the appellant: *First.* That the word "election," as used in the Constitution and statutes, is not used in its restricted sense, as meaning only an election by the people, but it should be construed as signifying chosen, or designated, and, when so construed, the appellant is entitled to the office in question by reason of his appointment by the board of commissioners of Lawrence county.

Second. That Brown was duly elected township trustee of Marion township, at the April election in the year 1890, and having failed to give bond and qualify within ten days after his term of office began, the office, under the provisions of section 5527, *supra*, became vacant, and the board of commissioners had the legal right to fill such vacancy by appointment.

No authority is cited by the appellant which supports his first position, and we have no knowledge of any such authority; while, on the contrary, the adjudicated cases seem to be harmonious in holding that where one is lawfully in the possession of an office, under a constitutional

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or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which such incumbent owes his election, or which by law is entitled to elect a successor. *Gosman v. State, ex rel.*, 106 Ind. 203; *State v. Lusk*, 18 Mo. 333; *People, ex rel., v. Tilton*, 37 Cal. 614; *Lawhorn, Ex Parte*, 18 Gratt. 85; *Johnson v. Mann*, 77 Va. 265; *State, ex rel., v. Jenkins*, 43 Mo. 261; *State, ex rel. v. Harrison*, 113 Ind. 434.

In view of these authorities, we are not at liberty to adopt the construction contended for by the appellant in this case.

We have no doubt that Brown was duly elected township trustee of Marion township.

When the last vote was cast, and the polls closed, the electors had made their choice, and the count could do nothing more than ascertain the result. The election officers had no power to elect any one after the polls were closed, their duty being confined to ascertaining the result of the balloting, and furnishing the necessary evidence of such result.

But does it follow that, because Brown was elected and failed to qualify, the office of township trustee became vacant, and the board of commissioners acquired the right to appoint?

The rule is that, where a person is in the possession of an office, under a constitutional or statutory provision like that found in our Constitution, and a successor is duly elected, but dies before he qualifies, no vacancy occurs, since one of the contingencies upon which the incumbent's term of office is to expire has not taken place, namely, the qualification of a successor. *McCrary Elections*, section 314; *Commonwealth, ex rel., v. Hanley*, 9 Barr (Pa. St.), 513.

Commonwealth, ex rel., v. Hanley, supra, is, in its facts, similar to the case before us.

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In that case Hanley was duly elected clerk of the orphans' court in October, 1845, and was duly commissioned and qualified to serve for the period of three years from the 1st day of December of that year, and until his successor should be duly qualified. On the second Tuesday of October, 1848, Oliver Brooks was duly elected as his successor, but died before qualifying. The Governor, assuming that Hanley's office became vacant at the expiration of three years, appointed a successor.

In discussing the questions arising under these facts, the Supreme Court of Pennsylvania said: "Being duly qualified in the constitutional sense, and in the ordinary acceptance of the words, unquestionably means that he, the successor, shall possess every qualification; that he shall, in all respects, comply with every requisite before entering on the duties of the office; that, in addition to being elected by the qualified electors, he shall be commissioned by the Governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the constitution of the commonwealth, and to perform the duties of the office with fidelity. Until *all* these prerequisites are complied with by his successor * * * the respondent is *de jure* as well as *de facto* the clerk of the orphans' court."

So, too, this court held in the case of *State, ex rel., v. Berg*, 50 Ind. 496, that, where a township trustee was elected his own successor, and did not qualify under his second election, his office did not become vacant, and he was entitled to hold under his first election until a successor was elected and qualified.

The weight of authority is that where there exists a constitutional provision, such as we are now considering, a term of office fixed by statute runs not only for the period fixed, but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take the office. The period between the expiration of the term fixed by statute and the time at which a suc-

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cessor shall be qualified to take the office is as much a part of the incumbent's term as the fixed statutory period. *Tuley v. State, ex rel.*, 1 Ind. 500; *Miller v. Burger*, 2 Ind. 337; *Baker v. Kirk*, 33 Ind. 517; *State, ex rel., v. Berg, supra*; *Gosman v. State, ex rel., supra*; *Elam v. State, ex rel.*, 75 Ind. 518; *People, ex rel., v. Whitman*, 10 Cal. 38; *Commonwealth v. Hanley, supra*; *State, ex rel., v. Harrison, supra*.

It follows from what we have said that the appellee is entitled to the office in dispute, unless the appellant has been legally chosen and qualified as his successor. As we understand the brief of the appellant, it is not seriously contended that the election held in November, 1890, conferred any rights upon the appellant. As the election of a township trustee at that time was wholly unauthorized by law, such election was void, and conferred no right to the office.

Nor did the board of commissioners possess the legal authority to appoint the appellant to the office for the reason, as we have seen, that there was no vacancy, and, there being no vacancy, the appellee's successor could be chosen only by the constituency which elected him.

As to the construction to be placed upon section 5527, *supra*, or as to what provisions of that section, if any, conflict with the section of the Constitution above set out, we think it unnecessary to inquire in this case, for the reason that the state of facts to which it is applicable does not arise. As Brown died before any certificate of election was issued to him, and as he did not intentionally abandon the office, this statute is not applicable to the case before us.

As we have reached the conclusion that the law is with appellee, upon the facts above stated the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

Filed Jan. 6, 1892.

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No. 15,957.

**McCONNELL ET AL. v. THE CITIZENS' STATE BANK OF
PETERSBURGH.**

130	127
136	696
130	127
139	263

DEED.—*Consideration.*—*Recital in as Evidence of.*—A recital in a deed of the amount of the consideration is *prima facie* evidence of the payment of such consideration.

FRAUDULENT CONVEYANCE.—*Proof of Insufficiency of Debtor's Property to Pay His Debts.*—When a creditor of a grantor attacks his conveyance on the ground that it was fraudulent, he must aver and prove that when the conveyance was made, as well as when suit was brought, the debtor did not have enough property subject to execution to pay all his debts.

SAME.—*Creditor Holding Mortgage Securing His Debt.*—*Security Insufficient.*—*Foreclosure Before Suit Brought to Set Aside Conveyance.*—A creditor holding a mortgage securing his debt on property insufficient to satisfy such debt is not bound to foreclose and sell such property before bringing his action to set aside his debtor's fraudulent conveyance. *Law v. Smith*, 4 Ind. 56, and *Baugh v. Boles*, 35 Ind. 524, criticised.

From the Gibson Circuit Court.

L. C. Embree, for appellants.

J. H. Miller and *F. B. Posey*, for appellee.

MCBRIDE, J.—This was a suit by a creditor to set aside as fraudulent a conveyance of land by his debtor. On the 19th day of January, 1889, James H. McConnell and Elisha E. Bell executed to appellee their note for \$3,000, borrowed money. At that time McConnell owned the land in controversy, with other lands. On the 31st day of January, 1889, he, with his wife, Lotta McConnell, conveyed the land in controversy to the appellants, who on the same day conveyed the undivided one-half of the same to said Lotta for the term of her natural life. Appellant William T. McConnell is a son of said James H., and appellee claims that the conveyance to him and his wife by James H. and Lotta was voluntary and without consideration, and left the debtor without sufficient property remaining for the payment of his debts.

The appellants present and argue several propositions. The conclusion we have reached, however, after a careful exam-

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ination of the evidence, renders it unnecessary for us to examine or pass upon more than two of these questions. The allegations of the paragraph of the complaint upon which the finding is based are sufficient.

The facts, as developed by the evidence, are substantially as follows, in so far as they bear on the question of consideration for said conveyance :

July 16th, 1861, the debtor, James H. McConnell, was a widower, with two children, both infants. One was the appellant William T., and the other was a daughter, named Isadora. He owned a tract of land in Gibson county, known in this litigation as the Barton township farm. This farm he conveyed to said children on that day. Afterward the daughter died intestate, leaving as her sole heirs her father and brother. February 26th, 1883, the appellant, having come of full age, conveyed the land to his father. He testifies that this was done because he had become dissatisfied with the Barton township land, and wanted instead the land now in controversy, which at that time was an undivided interest, in what was known as the Hargrove farm, and that it was then agreed between him and his father that he should deed the Barton farm back to the father, who should, in exchange therefor, convey to him the Hargrove farm as soon as he had cleared it of a mortgage then on it for purchase-money ; and that if it was not cleared of said mortgage the Barton township land was to be reconveyed to him.

He further testifies that at the time he executed said deed to his father, the father gave him a note for \$3,000, due one day after date, with eight per cent. interest, but that by their agreement the note was to be fully paid by the conveyance of land under said agreement, and not in money. This note, he testifies, was destroyed by a fire which destroyed his residence and all his papers, and was never renewed.

He further testifies that the deed of January 31st, 1889, was made in execution of the agreement thus existing between him and his father, and that, instead of being without

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consideration, the father was compensated by the previous conveyance of the Barton township land. In all this he is fully corroborated by his father and his step-mother, Lotta McConnell.

They also all testify to the following additional facts: That on the day of the making of said deeds,—January 31st, 1889,—said James H. McConnell, being about to borrow of one John Sipp \$4,250, wished to execute to him a mortgage on the Barton township land to secure it, but that his wife refused to join in the mortgage until it was agreed that said deeds should be made, whereby she was to and did receive a life-estate in the undivided one-half of the Hargrove farm, while the fee to the whole was conveyed to appellants.

No witnesses were called to contradict these witnesses, nor was any testimony of any kind offered tending to contradict them. Appellee's counsel say, 'however, "The court evidently found that the Barton township land had been deeded by the father to the son when he was a minor, and without any consideration, and that when the son became of age he deeded the land back to the father without any consideration, and we feel very confident that the court, under the evidence of the son, William T. McConnell, was justified in coming to that conclusion."

Counsel, while admitting that William T. testified to the foregoing facts, cited several circumstances, also disclosed by his testimony, which they argue are inconsistent with the claim that the deed was executed upon the valuable consideration claimed, and insist that by reason of these inconsistencies and discrepancies the court was fully warranted in reaching the conclusion that the deed was without consideration and fraudulent.

It has long been the unvarying rule of this court not to disturb the finding of a court or the verdict of a jury where there is evidence tending to support it on all material questions involved. This has been so many times decided that

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it is unnecessary to cite authority. Where there is no evidence to support a finding or a verdict on any material point, it has also been the unvarying practice of this court to set such finding or verdict aside. *City of Warsaw v. Dunlap*, 112 Ind. 576; *Hutchinson v. Trauerman*, 112 Ind. 21; *Roby v. Pipher*, 109 Ind. 345; *Moellering v. Kayser*, 110 Ind. 533; *Kitch v. Schoenell*, 80 Ind. 74; *Stough v. Smith*, 50 Ind. 250; *Bradford v. Bradford*, 59 Ind. 434; *Jeffersonville, etc., R. R. Co. v. Bowen*, 49 Ind. 154.

In this case, the appellee, being the plaintiff below, sought to set the conveyance in question aside, on the ground that it was voluntary and without consideration. The allegation of the complaint, relating to consideration, was, that the conveyance was made "for a colorable consideration of \$3,500, but for no real consideration whatever."

This allegation was material, and its establishment by proof was essential to entitle appellee to a recovery. The burthen was on appellee to establish as a fact, and by evidence, that the deed was made without consideration. This counsel argue was done, because they say that while the witnesses testified to a valuable consideration, they testified to certain other facts, from which inferences may, and they think should, be drawn inconsistent with and contradicting their claim of the existence of such consideration.

Appellants insist that no inferences that can be fairly drawn from the testimony are inconsistent with their claim, but, assuming that they are, how will this affect the case? Suppose the testimony of the three witnesses is self-contradictory, as insisted by counsel, and to such extent that no reliance can be placed on it,—and this, we think, after a careful reading,—is the utmost that could be claimed for it, the effect of this would be to eliminate it from the record. If it could not be believed, it should be disregarded. Would this prove there was no consideration for the deed? The deed was in evidence, and contains a recital that it was executed in consideration of the sum of \$3,500. This is at

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least *prima facie* evidence of the payment of a valuable consideration, and of the amount of such consideration. 1 Greenleaf Ev., section 26, note 1, and cases there cited; Lawson Presumptive Ev. 84; *Stall v. Fulton*, 30 N. J. L. 430; *Nutting v. Herbert*, 37 N. H. 346; *Clements v. Landrum*, 26 Ga. 401.

We think the circumstances tend strongly to corroborate rather than to impeach these witnesses, especially the following facts, which are undisputed:

The Barton township land was in fact conveyed to appellant William T. in 1861, and held by him to 1883, more than twenty-one years. After the death of his sister he was owner of the undivided three-fourths of it. This farm, as shown by the evidence, contained one hundred and twenty acres, and was worth \$4,500 to \$5,000. Although the deed to him was sustained only by the consideration of love and affection, that consideration was good, and his title in 1883 was presumably unimpeachable. While it is not unusual for parents to give lands to their children, it is unusual to find children giving lands to their parents. Yet to sustain appellee's contention, we must assume that when appellant conveyed this land to his father in 1883 he did the unusual thing of making his father a gift of it, and that the three witnesses who testify that he was to be compensated for it, and that the deed now assailed was the promised compensation, testified falsely.

After a careful scrutiny of the testimony we fail to find any evidence to support the allegation that the deed was without consideration, and for that reason the judgment must be reversed.

This is not a case where there is a conflict of evidence, but is a case where there is no evidence whatever to sustain a material averment in the complaint.

May 24th, 1889, James H. McConnell, the debtor, with his wife, executed to appellee a mortgage on certain land to secure the payment of the debt here involved. No effort has

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been made to foreclose this mortgage. It, however, appears by the evidence, that, even if said mortgage was foreclosed by appellee, it would be inadequate to satisfy its debt. There is also evidence tending to show that all of said debtor's property together, which can be reached by ordinary process, is inadequate for the satisfaction of the debt.

Appellants insist, however, that before the appellee can maintain this action he must first foreclose said mortgage and exhaust all the debtor's remaining property. In this contention they are wrong. It was necessary for the appellee to aver and prove that when the conveyance was made, as well as when the suit was brought, the debtor did not have enough other property subject to execution to pay all his debts. Proof that he had at these times some property subject to execution, but not enough to pay all his debts, and especially as in this case not enough to pay the plaintiff's debt, will not defeat the action. *Lee v. Lee*, 77 Ind. 251, and cases there cited.

To require parties to first exhaust all the debtor's remaining property in such a case before pursuing the property fraudulently conveyed would frequently defeat justice, and aid in the consummation of the fraud by enabling the parties to effectually place the property beyond reach pending the necessary delay thus occasioned. If the proof in such case failed to show that the remaining property was insufficient to discharge all the debtor's liabilities, the plaintiff could not succeed. The fact that the party has a mortgage on property sufficient to secure only a part of the debt will make no difference.

In so far as expressions used in the cases of *Law v. Smith*, 4 Ind. 56, *Baugh v. Boles*, 35 Ind. 524, and other cases following, may seem to indicate a rule differing from that laid down in *Lee v. Lee*, *supra*, they are disapproved.

We think, however, from an examination of these cases the court did not intend to assert more than that the party attacking such conveyance must show, as we here hold, that

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after exhausting all the debtor's property it will still be insufficient to pay all his debts. Assuming this to be the meaning of the language used, there is no conflict in the cases.

Other questions presented by the record may not arise on another trial, and we will not consider them.

Judgment reversed, with instructions to the circuit court to grant a new trial.

Filed May 12, 1891; petition for a rehearing overruled Jan. 6, 1892.

130 133
130 597
130 599

No. 16,344.

COOK v. CLAYBAUGH.

DESCENTS.—*Widow Inheriting Land from Her Husband.*—*Marrying Second Husband.*—*Divorce Procured by Collusion.*—*Land Conveyed to Third Person.*—*Loan Procured on to Pay Second Husband's Debts.*—*Reconveyance.*—*Validity of Mortgage.*—A widow, by virtue of her marital rights, received a certain tract of land from her husband, and married. In order to procure money to pay off her second husband's debts, she entered into an agreement with him and his brother to the effect that she would obtain a divorce from her husband, then convey her land to his brother, the latter to procure a loan and mortgage the land to secure its payment, turn the money over to her husband, who was to assume the debt, he and she remarry, and the brother then reconvey the land to her. All this was done. Then she borrowed money of the appellee, who knew of the transactions narrated, and, with her husband, gave to the appellee the mortgage in controversy.

Held, that she took the land by purchase when it was reconveyed to her, and that the mortgage was valid.

DIVORCE.—*Agreement to Procure.*—*Validity of Divorce so Procured.*—A divorce procured by agreement between the parties is *prima facie* valid.

From the Howard Circuit Court.

M. Bell and *W. C. Purdum*, for appellant.

J. C. Blackledge, *C. C. Shirley* and *B. C. Moon*, for appellee.

OLDS, J.—This is an action upon a promissory note executed by the appellant, Hiley S. Cook, to the appellee, Joseph Claybaugh, and for the foreclosure of a mortgage se-

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curing the same, executed by said Hiley S. Cook and her husband, William H. Cook.

The appellant, Hiley S. Cook, filed a separate answer, seeking to avoid a foreclosure of the mortgage, alleging that in June, 1877, Lafayette McCarty died intestate, the owner in fee simple of the real estate described in the mortgage, together with other real estate, leaving as his only heirs at law his widow, the appellant, Hiley S. Cook, and five minor children, naming them, all of whom are still living and under the age of twenty-one years; that on July 5th, 1879, appellant was lawfully married to William H. Cook; that in a partition proceedings between the said widow and heirs of McCarty, the land described in the mortgage was set off to the appellant; that appellant's husband became largely indebted and desired to obtain a loan of \$500 to pay said indebtedness, and execute a mortgage on said land to secure the same, and, being unable to do so, an attorney was consulted, and by his advice and the solicitations of her said husband it was agreed by and between the attorney, the appellant, William H. Cook, her husband, and one Harvey Cook, brother of said William H. Cook, that the attorney should file a petition for the appellant against her husband and procure a divorce from him; that after the divorce was obtained the appellant was to convey the land to said Harvey Cook, who was to procure a loan of \$500 and secure the same by a mortgage upon said real estate and turn the money so borrowed over to William H. Cook, who was to assume the payment of the note and mortgage; then appellant and William H. Cook were to remarry, and said Harvey Cook was to then reconvey the land to the appellant; that the divorce was obtained, the land conveyed to Harvey Cook, a loan procured and real estate mortgaged, the money turned over to William H. Cook and he agreed to pay off the debt. Appellant and William H. Cook remarried, and Harvey Cook reconveyed the land to the appellant. William H. Cook paid off the note and mortgage, and afterwards the ap-

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pellant borrowed the money of the appellee, Claybaugh, and, her husband joining, they executed the mortgage described in the complaint to secure the same. It is further alleged that appellee had full knowledge of the facts at the time of the execution of the note and mortgage.

It is alleged that there was no intention of conveying the fee in the real estate to Harvey Cook; that he paid no consideration, and it was simply conveyed to him as a part of the scheme as above set out.

A demurrer was filed to this answer by the appellee and sustained; and the correctness of this ruling is the only question discussed.

The question presented by this ruling is whether or not the appellant, Hiley S. Cook, at the time of the execution of the mortgage held the real estate in virtue of her previous marriage with McCarty, or by virtue of the conveyance to her by said Harvey Cook. So far as the facts pleaded relating to the agreement in regard to the obtaining of a divorce and the transferring of the real estate are concerned, they do not disclose any real merit or equity in favor of the appellant. It does not appear that she was deceived, misled or coerced; she voluntarily entered into the agreement, and had the proceedings for divorce instituted, and procured a divorce from her husband. After the divorce was granted and when, for aught that appears, she was entirely free from the influence of her former husband, she makes a conveyance of the land to Harvey Cook, who afterwards conveyed the same to her. It is alleged that the mortgage executed by Harvey Cook upon the land while the title was in him has been paid by William H. Cook. For aught that appears in the answer, the note given in this case was for money received by the appellant or for her individual debt.

The principle enunciated in the opinion of the court in the case of *Nesbitt v. Trindle*, 64 Ind. 183, is decisive of the question in this case. In that case Harriet Trindle, widow of George Trindle, deceased, inherited one-third of the real

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estate of her husband. While she remained his widow she, without consideration, conveyed the land by deed in fee to one Learned, and then she intermarried with one Nesbitt, and, after her marriage with Nesbitt, Learned reconveyed the land to her. In that case the court says: "While said Harriett remained a widow, she had the right to dispose of said property, either for or without a consideration; her motives in the conveyance were not material; and she could not be chargeable with fraud upon her children, by conveying it, without consideration, because they had no legal interest in, or, at that time, right to it. She did so dispose of it, and subsequently acquired it by a new title. After that she did not hold the land by virtue of her previous marriage, and the restriction upon her right to alienate, contained in section 18 of the statute of descents, ceased to be operative upon it; and the only right of her children to inherit it was contingent upon her owning it at her death. Restrictions upon the right of the owner to alienate his land are not to be favored."

It is insisted that only the legal title was transferred by the conveyance to Harvey Cook and his reconveyances back to the appellant; that the equitable title remained in the appellant, and that she at all times held that in virtue of her former marriage. The conveyance in this respect in no way differs from that in the case of *Nesbitt v. Trindle*, *supra*. The conveyance in that case was without any actual consideration, and the court says the consideration is immaterial, as she has the right to convey the same without any consideration.

The facts alleged show the appellant conveyed the land to Cook by warranty deed. Such a deed conveyed a full and complete title to the land.

In accordance with the decision in the case of *Nesbitt v. Trindle*, *supra*, it has been held that, in a partition proceedings between the widow and heirs, if a sale be had the widow takes a complete title to the one-third of the pro-

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ceeds, and the heirs are divested of their right of inheritance in case of her death during a subsequent marriage; and this is true even when the widow becomes the purchaser of the land. She takes the land by purchase, and not by descent. *McMakin v. Michaels*, 23 Ind. 462; *Spencer v. McGonagle*, 107 Ind. 410.

We do not by our opinion in this case sanction the policy alleged to have been resorted to in order to secure a transfer of the land; but the divorce, though procured in the manner alleged, was *prima facie* valid, though it may have been set aside by reason of having been procured in pursuance of an unlawful agreement, and by practicing a fraud upon the court; yet, while the decree stood in full force, the appellant had the right to execute a conveyance for the land, either voluntarily or for a consideration, and pass the title to a third person.

There was no error in sustaining the demurrer to the answer.

Judgment affirmed, at costs of appellant.

Filed Jan. 6, 1892.

No. 15,494.

DU BREUIL v. THE PENNSYLVANIA COMPANY.

JURISDICTION.—*Injury to Land Lying in Another State.*—*Defendant Having Railroad Running Through this and such Other State.*—An action can not be maintained in this State for an injury to land lying in another State caused by a railway company having a line of railroad running through this and such other State.

SAME.—*Trespass to Real Estate.*—*Action Local.*—An action of trespass for an injury to real estate must be brought in the county where the real estate is situated.

From the Lake Circuit Court.

T. J. Wood and M. Wood, for appellant.

J. Brackenridge, for appellee.

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ELLIOTT, C. J.—The appellant asserts, by his complaint, a right to recover for injury to land owned by him situated in the State of Illinois. The cause of the injury to his land is alleged to have been the negligence of the appellee in suffering fire to escape from locomotives owned and used by it in operating a railroad of which it was the owner, extending through Lake county in this State and Cook county in the State of Illinois.

It is unnecessary to notice all of the objections urged against the complaint, for the objection that the Lake Circuit Court had no jurisdiction is fatal to the appellant's case. We are clear that an action for an injury to land situated in the State of Illinois can not be maintained in the courts of Indiana against a railroad company owning and operating a line of railroad running through parts of both States.

The Lake Circuit Court has jurisdiction of actions brought to recover damages for injury to lands only in cases where the land is situated in Lake county, for so the statute provides. Section 307, R. S. 1881, subdivision 1. Trespass to land resulting in injury to the land itself has always been regarded by our court as a local and not a transitory action. *Ham v. Rogers*, 6 Blackf. 559; *Prichard v. Campbell*, 5 Ind. 494; *Loeb v. Mathis*, 37 Ind. 306. The common law always regarded actions for injury to land as local. *Bennett v. McIntire*, 121 Ind. 231; *Rasor v. Qualls*, 4 Blackf. 286; *Taylor v. Cole*, 3 Term R. 292; *Doulson v. Matthews*, 4 Term R. 503; *Livingston v. Jefferson*, 1 Brock. 203. The general doctrine was applied to an action for injury to land caused by fire escaping from locomotives in the case of *Indiana, etc., R. W. Co. v. Foster*, 107 Ind. 430. The court there adjudged that the action must be brought in the county where the land lies, although the company had no agent nor any office in that county.

The case before us is one in which the land lies within the territory of another sovereignty and there can be no doubt, upon principle or authority, that our courts have no juris-

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diction. In *Eachus v. Trustees, etc., Co.*, 17 Ill. 35, it was held that the courts of Illinois had no jurisdiction in an action to recover for injuries to land situate in Lake county in this State. The decision in the case cited is but the application of a well-settled principle to a particular instance. *Dodge v. Colby*, 108 N. Y. 445; *American, etc., Co. v. Middleton*, 80 N. Y. 408; *Cragin v. Lovell*, 88 N. Y. 258; *McKenna v. Fisk*, 1 How. 241; *Watts v. Kinney*, 6 Hill, 82; *Champion v. Doughty*, 18 N. J. L. 3; *Allin v. Connecticut, etc., Co.* (Mass.), 6 Lawyers' Rep. Anno. 416, and note; 1 Smith Leading Cases, 781.

Judgment affirmed.

Filed Jan. 7, 1892.

No. 15,256.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. CREEK, ADMINISTRATOR.

PRACTICE.—Technicalities.—Disregarding.—Informalities.—Slight informalities, or failures to comply strictly with the rules of practice, in matters where such informalities or omissions will not work injustice or impose any hardship on the opposite party, should be disregarded when a substantial controversy existing between the parties is so presented that the court can apply the law and adjust their rights.

INTERROGATORIES TO JURY.—When Control General Verdict.—A general verdict can be overturned by the special findings of the jury only when such verdict and findings can not be reconciled with each other under any supposable State of facts provable under the issues.

SAME.—Presumption in Favor of General Verdict.—The court will not presume anything in aid of the special findings of a jury, but will make every reasonable presumption in favor of the general verdict.

SAME.—Motion.—Sufficiency of.—Motion as follows: "The defendant files motion for judgment on answers to interrogatories notwithstanding the general verdict for plaintiff."

Held, sufficient, though deemed very informal.

NEGLIGENCE.—Wife Injured at Railroad Crossing when Riding with Her

130	139
134	403
130	139
137	149
139	301
130	139
140	273
130	139
156	423
130	139
158	664
130	139
159	668

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Husband.—Imputing His Negligence to Her.—A wife injured at a railroad crossing by the negligence of the railway company, while travelling with her husband who is driving his wagon in which she is riding, is not prevented from recovering her damages from such company by reason of the fact that he was guilty of negligence in approaching such crossing. His negligence in such an instance is not imputed to her.

From the Carroll Circuit Court.

E. C. Field and *C. C. Matson*, for appellant.

J. H. Gould, for appellee.

McBRIDE, J.—Suit by the appellee, as administrator of the estate of Matilda McClintic, who was killed on a highway crossing by one of the appellant's locomotive engines.

The complaint charges, in substance, that the decedent's death was caused by the actionable negligence of the appellant, in this, that appellant had allowed a hedge, together with trees, bushes and weeds, to grow along the line of its track, and adjacent to said crossing, to such height and so densely that for a long distance all view of the track was cut off from persons on the highway; that the same obstructions, together with buildings erected along and near its track, tended to deaden and cut off the sound of approaching trains; that employees of appellant, in charge of and operating said locomotive engine, and drawing a train of cars, ran the same upon and over said crossing at a speed of thirty miles an hour, without having given the signals required by statute; that the decedent, with her husband, was travelling along said highway in a buggy; that they were at the time passing over said crossing, using due care, and guilty of no negligence, and were struck by said locomotive and decedent was killed.

Verdict for the appellee. With the verdict the jury returned answers to forty-six interrogatories propounded by the appellant. The appellant moved for a judgment on the answers to interrogatories notwithstanding the general verdict. This motion was overruled, and this ruling presents the only question in the record.

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The appellee contends that the motion was fatally defective, and does not raise the question argued.

The record entry of the motion is as follows :

" Comes now the defendant, and moves the court for a judgment upon the answers of the jury to the interrogatories submitted, notwithstanding the general verdict, which motion is in these words :

" *'State of Indiana, Carroll County, ss. :*

" *' In the Carroll Circuit Court, May term, 1889.*

" *' Creek, Adm'r McClintic, vs. L., N. A. & C. Ry. Co.*

" *' The defendant files motion for judgment on the answers to interrogatories notwithstanding the general verdict for plaintiff.' "*

This motion was in writing, and was signed by counsel for the appellant.

Counsel for the appellee says: " We submit that it is no motion at all. It merely announces that the appellee files motion, but where is it? And for whom is judgment asked? No question was presented by such a paper. Besides, as the appellant did not move for a judgment *in its favor*, it is not injured by the court's rulings."

The motion is certainly lacking in formality and in certainty.

Rules of practice and procedure are necessary for the orderly conduct of litigation, and as aids in the administration of justice.

It is no hardship to require of litigants substantial conformity to reasonable rules.

It is possible, however, by an over rigid and strict enforcement of the rules of practice, to make them hindrances to the doing of justice, rather than aids. When a substantial controversy in fact exists between parties, which is so presented that the court can apply the law, and adjust their rights, it would not be in accordance with the spirit of an enlightened jurisprudence to refuse to do so, merely because of some slight informality, or a failure by one party to com-

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ply strictly with the rules of practice in matters where the informality or omission will not work injustice, or impose any hardship upon the opposite party. Thus applied, most beneficent rules might often serve as intrenchments for injustice.

In our opinion, notwithstanding the informality and lack of precision and certainty in the motion, it is sufficient as a motion by the appellee for a judgment in its favor, and it is our duty to consider the questions thus presented.

The motion for a judgment *non obstante* is based upon the ground:

1st. That the answers to interrogatories show that the appellee's decedent was guilty of contributory negligence.

2d. That if this is not true, they do show that the husband of the decedent, with whom she was riding at the time she was killed, *was* guilty of negligence, and that his negligence should be imputed to her, and precludes a recovery by her administrator.

A motion for a judgment on special findings notwithstanding the general verdict should only be sustained when the special findings and the general verdict can not be reconciled with each other under any supposable state of facts provable under the issues. *Stevens v. City of Logansport*, 76 Ind. 498; *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476; *Higgins v. Kendall*, 73 Ind. 522; *Louthain v. Miller*, 85 Ind. 161; *Amidon v. Gaff*, 24 Ind. 128; *Shoner v. Pennsylvania Co.*, *post*, p. 170; *Town of Poseyville v. Lewis*, 126 Ind. 80; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460.

The court will not presume anything in aid of the special findings, but will make every reasonable presumption in favor of the general verdict. *Pittsburgh, etc., R. W. Co. v. Martin*, *supra*; *Shoner v. Pennsylvania Co.*, *supra*; *Town of Poseyville v. Lewis*, *supra*, and cases cited.

As above stated, the special findings were forty-six in number. They were also long, and no good purpose would be subserved by incorporating them into this opinion.

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After a careful examination, we are of the opinion that no specific fact is found which would justify us in disregarding the general finding that she was free from contributory negligence, necessarily embraced in the general verdict.

The principal argument of appellant's counsel is directed to the question of imputed negligence. Their position is, that because of the relations existing between husband and wife, and because of his duty to care for and protect her, if a wife places herself in her husband's care, by riding in a conveyance driven or controlled by him, and he is guilty of negligence in the control or management of the conveyance, his negligence is her negligence. If she is at the same time hurt by the negligence of another, being herself entirely free from fault, yet if the husband's negligence contributes to her injury, his negligence will be imputed to her, and she can not recover.

We can not sanction this doctrine. It was expressly repudiated by this court in the case of *Miller v. New Albany, etc., R. W. Co.*, 128 Ind. 97. There are cases where the negligence of one person will be imputed to another, but, as stated in the case last cited, the extreme doctrine has never been sanctioned by this court. See, also, *City of Michigan City v. Boeckling*, 122 Ind. 39.

The extent to which the doctrine of imputable negligence is recognized in this State is thus stated by MITCHELL, J., in *Town of Knightstown v. Musgrove*, 116 Ind. 121, at page 124: "Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest

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or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him." The court in the same case further says: "Where one accepts the invitation of another to ride in his carriage, thereby becoming in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful and skilful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury."

We can see no good reason why the foregoing statement may not apply to a wife riding with her husband with as much reason as to a stranger riding with him, nor why she may not be in such case a mere passive guest, without authority to direct or control his movements and without reason to suspect his prudence or his skill. A husband and wife may, undoubtedly, sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect.

In our opinion there would be no more reason or justice in a rule that would in cases of this character inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sins because she was his wife.

In the case at bar the complaint contains the following averment: * * * "Her said husband, driving said horse, and managing and controlling said horse and buggy, the said Matilda having no control of her said husband, and no control or management of said horse and buggy."

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In aid of the general verdict it will be presumed that this averment was sustained by the evidence.

It is unnecessary to express any opinion as to the effect of the special findings in showing negligence on the part of the husband. As the case comes to us it is not material whether he was negligent or not.

Judgment affirmed, with costs.

Filed Jan. 7, 1892.

No. 15,394.

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130	145
152	563

PRINCIPAL AND SURETY.—*When Question of Suretyship May be Tried.*—

Where the question of suretyship has not been determined in the original action, a complaint may be filed after the term at which judgment was rendered, and after the surety has paid the judgment, to adjudicate the question.

SAME.—*Payment by Surety when Question of Suretyship not Determined.*—*Right of Surety as Against Assignee of Subsequent Judgment Against His Principal.*—*Question of Suretyship put in Issue on a Defence.*—If a surety, whose

suretyship is not determined by the judgment, pay the amount due on such judgment, and take an assignment by record of it to himself, he may enforce the lien of such judgment as against the assignee of a judgment rendered subsequently against his principal; and if the assignee bring an action challenging the priority of his lien, he may set up the fact of his suretyship by answer, and have the matter then determined.

JUDGMENT.—*Payment by One of Two Joint Principals.*—One of two, or more, joint principals can not pay off the judgment against them and take an assignment thereof to himself.

From the Pike Circuit Court.

E. P. Richardson and A. H. Taylor, for appellant.

E. A. Ely, for appellees.

MILLER, J.—The appellant, who was the plaintiff, filed a complaint against the appellees, in substance, as follows:

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That, on the 24th day of February, 1884, the appellee Lafayette Brenton and another executed a promissory note to one William W. Totten in part payment for real estate that day conveyed by Totten to Brenton. The note was assigned by Totten to one Offill, who, on the 12th day of June, 1888, took judgment on the note against Brenton for \$740.85. This judgment was, on the 6th day of September, 1889, sold and properly assigned to the appellant; that said Lafayette Brenton, Emily Brenton and one Robert C. Conrod, on the 11th day of June, 1887, executed their joint and several promissory notes to one Charles E. Montgomery, on which notes Montgomery recovered a judgment against the makers November 8th, 1887, for \$748.73. On the day the judgment was rendered Lafayette Brenton paid thereon \$300, and at another time he paid \$100; that, on the 30th day of July, 1888, Conrod paid \$431.60, in full of the principal, interest and costs, and, instead of having satisfaction entered, procured Montgomery to assign the judgment to him. On the — day of August, 1889, Conrod assigned the judgment to the appellee Traylor, who claims that the judgment is unpaid, and that it is senior to the judgment held by the appellant. The prayer is that the judgment held by Traylor be declared satisfied.

The defendant Traylor answered this complaint, alleging in his answer, among other things, that Conrod was the accommodation surety of Lafayette Brenton in the note to Montgomery, and that he made the payment of the balance due on the judgment, as such surety, and at the time he did not intend that the judgment should be discharged; that as a matter of precaution and notice to others, he procured Montgomery to assign the judgment to him, intending to become subrogated to all the rights of Montgomery in and to so much of the judgment as he had paid as such surety. It is also alleged that the appellant, at the time he purchased the judgment, knew that Conrod was such surety, and that he paid the Montgomery judgment as such.

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The appellant contends that the various pleadings filed by the appellee, disclosing the facts above set out, were each bad on demurrer for failing to show that the question of suretyship between Conrod and Brenton had been determined by a judicial proceeding prior to the assignment of the judgment by him to the appellee Traylor.

The judgment in favor of Montgomery upon its face appears to be against all the makers as principals, and they are all primarily liable for its payment.

If, in such case, the relationship of the judgment defendants is as it appears upon the face of the judgment to be, the payment by one of them would work a complete extinguishment and satisfaction of the judgment, notwithstanding the agreement that it should be kept alive and its assignment to Conrod. *Montgomery v. Vickery*, 110 Ind. 211; *Klippel v. Shields*, 90 Ind. 81.

This, however, is not the question with which we have to deal, for it is alleged that Conrod was, in fact, a surety, who had paid the debt of his principal, although such suretyship had not been judicially declared. It has been held that where this question has not been judicially determined in the original action, a complaint may be filed after the term, and after the surety has paid the judgment, to adjudicate that question. *Scherer v. Schutz*, 83 Ind. 543; *Richardson v. Hawk*, 45 Ind. 451; *Montgomery v. Vickery*, *supra*; *Knopf v. Morel*, 111 Ind. 570; *Duffy v. State, ex rel.*, 115 Ind. 351; *Kreider v. Isenbice*, 123 Ind. 10.

The case of *Manford v. Firth*, 68 Ind. 83, is, in many respects, similar to this one. In that case a surety paid the amount due on a judgment against all the makers, there having been no adjudication of his suretyship, and took an assignment executed by the attorney of the judgment plaintiff. The assignment was invalid to transfer the legal title of the judgment because of want of authority on the part of the attorney to make it. It was held that it was good as an equitable assignment, and as such was notice to all subse-

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quent purchasers that it had not been satisfied, and that when the surety had his suretyship determined he was subrogated to all the rights of the judgment creditor.

We regard this as decisive of the objection that the adjudication of suretyship must precede the assignment of the judgment by Conrod to the appellee.

We are also of the opinion that Conrod, having paid the amount due on the judgment, and having the right, dependent upon having his suretyship afterward determined, to hold the judgment under such assignment, was vested with property rights and interests in the same which he might sell and assign to another. *Johnson v. Amana Lodge*, 92 Ind. 150; *Manford v. Firth*, *supra*.

The equitable right of the surety to be subrogated to the rights and position occupied by the judgment creditor before payment of the judgment is very strong, and the courts are disposed to look with favor upon any arrangement not in contravention of some rule of law to place him in that position. *Harper v. Keys*, 43 Ind. 220; *Arbogast v. Hays*, 98 Ind. 26.

The appellee having been brought into court by the appellant in an action challenging the validity of his claim to hold the judgment as a lien upon the land of Brenton, it became competent for him to have the suretyship of Conrod determined in the action.

We have examined the evidence, and are satisfied that it fully sustains the finding of the court. The only objection pointed out in argument is the alleged failure to show notice to the appellant of the suretyship of Conrod, and of the payment of the judgment by him as such surety. If the appellant was a purchaser of real estate upon which the judgment would, if unsatisfied, be a lien, we would have a different question, and the cases of *Dougherty v. Richardson*, 20 Ind. 412, and *Thomas v. Stewart*, 117 Ind. 50, would be in point.

The judgment did not appear to be satisfied; on the contrary, it bore upon its face an assignment to Conrod, and this

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of itself was sufficient to put the appellant upon inquiry as to the nature of his claim. *Manford v. Firth, supra.* It is not necessary, to charge the appellant with notice, that we should go to the extent that we would be authorized by the opinion in *Downey v. Washburn*, 79 Ind. 242.

Judgment affirmed.

Filed Jan. 7, 1892.

No. 16,200.

THE CITY OF CRAWFORDSVILLE ET AL. v. BRADEN.

POLICE POWER.—*Delegation to Municipalities.—How Made.*—The police power primarily inheres in the State; but the Legislature may delegate, at least a part of it, to municipal corporations, either in express terms or by implication arising from the fact of the creation of such corporations.

MUNICIPAL CORPORATIONS.—*Enumeration of Powers in General Statute.—Effect.*—The enumeration in the general statute for the incorporation of cities of certain powers which would belong to the corporation without such specific enumeration is merely a declaration of a pre-existing power, or of a power which is inherent in the nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. Such enumeration of powers, although it include a portion of those usually implied, does not necessarily operate as a limitation of corporate powers by excluding those not enumerated.

SAME.—*Health and Safety of Inhabitants.—Right to Guard.*—By the act authorizing or incorporating a municipal corporation, the Legislature expressly delegates to the municipality the power to preserve the health and safety of its inhabitants.

SAME.—*Lighting Street.—Implied Power.*—The power to light the streets and public places of a municipality is one of its implied and inherent powers, necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. No statute is necessary to give it this power.

SAME.—*Discretion.—Not Controlled by Courts.*—The discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in case of fraud or where the discretion has been grossly abused to the oppression of the inhabitants.

130	149
132	581
130	149
138	361
130	149
142	543
142	552
130	149
154	495
156	401
130	149
157	392
130	149
180	43
180	57
130	149
182	47

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SAME.—Power to Light.—Implied Power to Select Means.—The power to light a city carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.

SAME.—Light.—Furnishing to Private Consumers.—A city has the power to establish works for lighting its streets, and may, in connection therewith, furnish private consumers such light by contract.

SAME.—Resolution.—Ordinance.—When May Use Either One.—Where a city has power to act in a given instance, and its charter or the general law does not prescribe the manner of its action, it may accomplish its purpose either by a resolution or by an ordinance.

JUDICIAL NOTICE.—Electricity.—The courts take judicial notice of electricity and of its properties, but not of the several methods of generating, transmitting or using it.

From the Montgomery Circuit Court.

W. T. Brush, P. S. Kennedy, S. C. Kennedy, T. F. Davidson and J. West, for appellants.

B. Crane and A. B. Anderson, for appellee.

McBRIDE, J.—The question we are required to decide in this case is, has a municipal corporation in this State the power to erect, maintain and operate the necessary buildings, machinery and appliances to light its streets, alleys and other public places with the electric light, and at the same time and in connection therewith to supply electricity to its inhabitants for the lighting of their residences and places of business. Some other questions are incidentally involved, but the principal controversy is as above stated.

That a city or an incorporated town may buy and operate the necessary plant and machinery to light its streets, alleys and other public places is not controverted by the appellee, but he denies the right to furnish the light to the individual for his private use. The question is argued on the theory that if the city has such power it must be by virtue of some express legislative grant, and is not among the implied powers possessed by municipal corporations; that statutes conferring powers upon municipal corporations, especially those involving the exercise of the taxing power, must be

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strictly construed, and that, strictly construed, no statute confers the necessary authority.

The purchase of the necessary land, machinery and material, and the erection and maintenance of such a plant do involve the exercise of the taxing power. The necessary funds must be supplied by taxing the taxpayers of the municipality.

The only statute bearing directly upon this question is the act of March 3d, 1883. (Elliott's Supp., section 794 *et seq.*) Section 794 contains the following: "That the common council of any city in this State, incorporated either under the general act for the incorporation of cities, or under a special charter, and the board of trustees of all incorporated towns of this State, shall have the power to light the streets, alleys and other public places of such city and town with the electric light, or other form of light, and to contract with any individual or corporation for lighting such streets, alleys and other public places with the electric light, or other forms of light, on such terms, and for such times, not exceeding ten years, as may be agreed upon."

Section 795 provides that for the purpose of effecting such lighting the common council of a city, or board of trustees of a town, may provide by resolution or ordinance for the erection and maintenance in the streets, etc., of the necessary poles and appliances.

Section 796 authorizes granting to any person or corporation the right to erect and maintain in the streets, etc., the necessary poles and appliances for the purpose of supplying the electric or other light to the inhabitants of the corporation.

Section 797 validates contracts of a certain character, made before the enactment of the statute, and section 798 provides for the appropriation of lands and right of way by corporations engaged in the business of lighting cities or towns, "or the public or private places of their inhabitants, with the electric light," etc.

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It will be observed that, while section 796 provides for granting to third persons the right to furnish the light to the inhabitants, it does not, in terms, give any such power to the corporation. It will, therefore, be necessary for us to inquire if the corporation possesses such power independently of the statute, or, if not, if the statute is susceptible of a fair construction, in accordance with established rules, which clothes the corporation with such power.

In the case of *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, this statute was considered, in so far as relates to the right of the city to buy and operate the necessary plant and machinery to light its streets, alleys and other public places, and it was held that the statute was sufficient to confer that power. In that case the court, after announcing the conclusion above stated, used the following language: "If there were any doubt as to the meaning of the act it would be removed by considering it, as it is our duty to do, in connection with the general act for the incorporation of cities, for that act confers very comprehensive powers upon municipal corporations as respects streets and public works, and contains many broad general clauses akin to those which Judge DILLON designates as 'general welfare clauses.' Our own decisions fully recognize the doctrine that municipal corporations do possess, under the general act, authority as broad as that here exercised, and the operation of that act is certainly not limited or restricted by the act of 1883."

The eminent author above referred to thus defines the powers of municipal corporations: "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.* Any fair, reasonable doubt concerning the existence of the power is resolved by the courts

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against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." Dillon Municipal Corporations (4th ed.), section 89. Judge Dillon, however, quotes approvingly from the Supreme Court of Connecticut as follows: Section 90, page 147: "All corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475 (501).

This principle has been repeatedly recognized by this court. Thus, in *Smith v. City of Madison*, 7 Ind. 86, it is said: "The strictness then to be observed in giving construction to municipal charters should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied, in order to the complete exercise of the powers granted."

Again, in *Kyle v. Malin*, 8 Ind. 34 (37), the court said: "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these

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limits they are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction."

Among the implied powers possessed by municipal corporations in this State are those grouped under the somewhat comprehensive title of "Police Powers"—a power which it is difficult either to precisely define or limit; a power which authorizes the municipality in certain cases to place restrictions upon the power of the individual both in respect to his personal conduct and his property; and also furnishes the only authority for doing many things not restrictive in their character, the tendency of which is to promote the comfort, health, convenience, good order and general welfare of the inhabitants.

The police power primarily inheres in the State; but the Legislature may, and in common practice does, delegate a large measure of it to municipal corporations. The power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation. The so-called inferred or inherent police powers of such corporations are as much delegated powers as are those conferred in express terms, the inference of their delegation growing out of the fact of the creation of the corporation, and the additional fact that the corporation can only fully accomplish the objects of its creation by exercising such powers.

Special charters, as well as general statutes for the incorporation of cities and towns, usually contain a specific enumeration of powers granted to and which may be exercised by such corporations. In many cases the powers thus enumerated are such as would be implied by the mere fact of the incorporation.

When powers are thus enumerated in a statute which would belong to the corporation without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as merely declaratory of a pre-existing power, or,

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rather, of a power which is inherent in the very nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. And the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated. *Clark v. City of South Bend*, 85 Ind. 276; *First Nat'l Bank v. Sarlls*, 129 Ind. 201.

The corporation, notwithstanding such enumeration, still possesses all of the usually implied powers, unless the intent to exclude them is apparent, either from express declaration or by reason of inconsistency between the specific powers conferred and those which would otherwise be implied. The Legislature can unquestionably take from municipal corporations powers which would inferentially be conferred upon them by their creation, or it can restrict the exercise of such powers, or in any manner control their exercise, the legislative will being as to such matters supreme.

Among the implied powers possessed by municipal corporations is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life and property.

Thus, in this State it has been held that, independently of any statutory authority, such corporations possess the inherent power to enact ordinances for the protection of the property of its citizens against fire. *Baumgartner v. Hasty*, 100 Ind. 575; *First Nat'l Bank v. Sarlls*, *supra*; *Hasty v. City of Huntington*, 105 Ind. 540; *Clark v. City of South Bend*, 85 Ind. 276; *Corporation of Bluffton v. Studabaker*, 106 Ind. 129.

This power will not only authorize the enactment and enforcement of ordinances establishing fire limits, regulating building and repairing buildings, and regulating the storage and traffic in inflammable or explosive substances, but the purchase of apparatus for extinguishing fires and furnishing

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a supply of water. *Corporation of Bluffton v. Studabaker, supra.*

In the case of *City of St. Paul v. Laidler*, 2 Minn. 190, the Supreme Court of Minnesota, after holding that a municipal corporation is "a creature of the statute, and in the exercise its authority can not exceed the limits therein prescribed," says: "It is a body of special and limited jurisdiction; its powers can not be extended by intendment or implication, but must be confined within the express grant of the Legislature," and then says further: "Incidental to the ordinary powers of a public municipal corporation, and necessary to a proper exercise of its functions, is the power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporate limits." If this statement is correct, it follows that to concede to municipal corporations the possession of such powers does not involve any extension, either by intendment or implication, of the powers expressly conferred by statute, but that by the act authorizing the organization of the corporation the Legislature expressly delegates to the municipality the power to take such steps as are necessary to preserve the health and safety (and we will add the property) of its inhabitants. The inference of the delegation of such powers follows inevitably and irresistibly, because their exercise is necessary to the accomplishment of the objects of the incorporation.

Where a municipal corporation attempts to exercise any of the powers thus implied, or inferentially conferred, it is within the rule of *Kyle v. Malin, supra*, as fully as it is when attempting to exercise those powers the warrant for which is found in the express letter of its organic law. It is to be favored by the courts, and such powers are not to be defeated or impaired by a stringent construction.

It is, of course, important and necessary to know in each case that the power claimed is, in fact, included in the implied powers of the corporation.

There can be little or no doubt that the power to light

the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. This is forcibly set forth by Judge Dillon in his work on Municipal Corporations, as follows:

"In a most important particular, however, Rome suffers by comparison with modern cities. Its public places were *not lighted*. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches. * * * No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay, of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this is essentially and peculiarly one pertaining to municipal rule and regulation. Nor are these studies, and the facts that they reveal, without practical value to the jurist. They demonstrate that a large and dense collection of human beings occupying a limited area have needs peculiar to themselves, which create the necessity for municipal or local government and regulation, and this in its turn the necessity for corporate organization. The body thus organized, as it has duties, so it acquires rights peculiar to itself as distinguished from the Nation or State at large." Dillon *Municipal Corporations* (4th ed.), section 3a.

While Judge Dillon's remarks have, of course, special reference to great cities, the difference in that respect between the greater and the minor municipal corporations is a difference in degree, and not in kind. Wherever men herd together in villages, towns, or cities will be found more or less of the lawless or vicious; and crime and vice are plants which flourish best in the darkness.

So far as lighting the streets, alleys and public places

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of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation.

It is well settled that the discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power, or discretion, is being grossly abused to the oppression of the citizen. *City of Valparaiso v. Gardner*, 97 Ind. 1; 15 Am. & Eng. Encyc. of Law, 1046, and authorities cited.

We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure, or furnish, whatever is necessary for the production and dissemination of the light. The only authority cited which holds a contrary doctrine is that of *Spaulding v. Inhabitants, etc.*, 153 Mass. 129.

We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the city of Boston, because authorized to light its streets, engaging in whale fishing to procure oil for that purpose, or the other supposed cases, and the generation and supply of electricity.

Electricity is not a commodity which can be bought in the markets, and transported from place to place like oil. We take judicial notice of the laws of nature, and of nature's powers and forces, and therefore take judicial notice of that which is known as electricity, and of its properties; not, of course, of the various methods of generating and transmitting or using it, but of the thing itself, and of its nature.

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As in many other cases, here the judicial presumption outruns the fact, and we are supposed to know, and to take judicial notice of more than we can, in fact, know in the present state of scientific knowledge. We must know, however, that it can not be generated and transported from place to place as we can procure and transport oil, clothing, etc., and that it can only be conveyed from the place where it is generated to where it is needed for lighting the streets, or to the numerous inhabitants of a city, so as to enable them to use it as a general illuminant, by invoking and exercising the power of eminent domain.

The corporation possessing, as it does, the power to generate and distribute throughout its limits, electricity for the lighting of its streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here again is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property, and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire, or to consume the oxygen in the surrounding air, and thus render it less capable of sustaining life and preserving health.

But little authority has been cited bearing on the precise question, and we have been able to find but little. The case of *Mauldin v. City Council of Granville* (N. C.), 8 Lawyers' Rep. Anno. 291, has been cited by the appellee. That was, like this, a suit by taxpayers of the city of Granville to restrain the city council from purchasing and operating an electric light plant to light the streets and public buildings of the city, and from using it for lighting private residences. In that case the

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court says: "The city has the express power to own property, and it also has the implied right to light the city. * * * Considering that some discretion, as to the mode and manner, should be allowed the municipality, in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not *ultra vires* and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city." The court, however, denied the right to furnish the light to the individual citizen, on the ground that to do so would be entering into private business outside of the scope of the city government. The court refers to the lack of authority on the precise question, and that it is largely a question of first impression without authority.

The case of *Thomson Houston Electric Co. v. City of Newton* (Iowa), 42 Fed. Rep. 723, was a suit to enjoin the city of Newton from purchasing and operating an electric light plant and furnishing the light to the inhabitants. The only statutory authority claimed by the city is as follows: "To establish and maintain gas works or electric light plants, with all the necessary poles, wires, burners and other requisites of said gas works or electric light plant." Acts 22 Gen. Assem. (Iowa), p. 16.

It will be observed that this statute does not, in terms, confer any power not, in our opinion, as above stated, included among the implied powers of municipal corporations. The court says: "It is also urged that the city has only the authority to erect an electric plant for the purpose of lighting the streets and public places of the city, and is not authorized to furnish lights for use in the houses and stores of its citizens. * * *

"It has been the uniform rule that a city, in erecting gas works or water-works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the

statutes of Iowa now place electric light plants in the same category."

The case of *Smith v. Nashville*, 88 Tenn. 464, is also in point as to the principle involved. The charter of the city of Nashville contained the following in its enumeration of the powers conferred upon the city: "To provide the city with water by water-works, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies."

Acting under the authority thus conferred, the city established water-works, and in addition to making provision for the extinguishment of fires, it furnished water to the citizens.

The right to do this was disputed, and formed the principal subject of controversy. The court said: "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants; nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all men can be furnished, in a populous city, only through the instrumentality of well-equipped water-works. Hence, for a city to meet such a demand is to perform a public act and confer a public blessing. It is not a strictly governmental or municipal function, which every municipality is under legal obligation to assume and perform, but it is very close akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. * * *

"It is the doing of an act for the public weal—a lending of corporate property to a public use. * * * It can not be held that the city, in doing so, is engaging in a private enterprise, or performing a municipal function for a private end.

While the authorities, on the precise question, are meager, we think the weight of authority, as well as of reason, tends to sustain the right of the municipality, through its proper officers, acting in the exercise of a sound discre-

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tion, to furnish light as well as water to its inhabitants, not only in its public places, but in their private houses and places of business.

An additional question is presented and discussed. It is shown by the averments of the complaint that such action as the city authorities have taken, and are proposing to take, is by virtue of a resolution adopted by the city council, and not by virtue of an ordinance, and that if the city is authorized to erect and operate an electric light plant it can only do so by virtue of an ordinance duly enacted.

In so far as the city derives any authority from the act of March 3, 1883 (Elliott's Supp., section 794 *et seq.*), it is authorized to act either by resolution or ordinance; but aside from the statute, where the city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its purpose by resolution as well as by ordinance. Note to *Robinson v. Mayor, etc.*, 34 Am. Dec. 625, and authorities there cited.

The court erred in overruling the demurrer to the complaint. The cause is reversed, at the costs of the appellee, with instructions to the circuit court to sustain the demurrer.

Filed Oct. 27, 1891; petition for a rehearing overruled Jan. 7, 1892.

No. 15,527.

130	166
181	876
130	164
135	608

**THE BOARD OF COMMISSIONERS OF VIGO COUNTY v.
WEEKS.**

COUNTY.—Heating Jail.—Wages of Engineer.—Liability to Sheriff Therefor.—

Where a skilled engineer is required to manage the steam-heating apparatus placed in a jail by the board of county commissioners, the county is liable for the wages of such engineer employed by the sheriff. *Wood v. Board, etc.*, 125 Ind. 270; *Board, etc., v. Barnes*, 123 Ind. 403; *Wright v. Board, etc.*, 98 Ind. 88, distinguished.

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From the Vigo Circuit Court.

W. J. Whittaker and T. W. Harper, for appellant.

H. D. Roquet, C. F. McNutt, J. G. McNutt, J. E. Lamb, G. W. Faris and S. R. Hamill, for appellee.

ELLIOTT, C. J.—The complaint in this case shows that the county of Vigo obtained and placed in its jail a steam heating apparatus and appliances; that it was necessary to employ a competent engineer to run the engine connected with the heating apparatus, and that the sheriff of the county did employ such an engineer, and that the compensation agreed upon is a just and reasonable one. The appellant unsuccessfully demurred to the complaint, and on that ruling error is alleged.

The complaint states a cause of action. The statute provides that the jail shall be maintained at the expense of the county. It reads thus: "There shall be established and kept in every county by authority of the board of county commissioners, and at the expense of the county, a prison for the safe keeping of prisoners lawfully committed." Section 6115, R. S. 1881. The only question that can arise under this statute is, what can be considered as part of the expense of keeping the county prison? Under the decisions heretofore made, and to which we rigidly adhere, the sheriff can not successfully claim compensation for official services rendered by him, or which it was his duty to render, although they relate to the care and keeping of the jail. *Bynum v. Board, etc.*, 100 Ind. 90; *Board, etc., v. Gresham*, 101 Ind. 53; *Taylor v. Board, etc.*, 110 Ind. 462. But this case does not fall within the rule established, and rightly established, by those decisions and kindred ones, for here it was not the duty of the sheriff to manage the engine. As it was not his duty to take charge of the engine, and, as the board made the safe and proper management and care of the engine necessary as part of the expense of keeping the jail, the county is bound to pay the wages of the engineer. The

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case falls within the rule laid down in *Board, etc., v. Reissner*, 58 Ind. 260, and *Board, etc., v. Reissner*, 66 Ind. 568. The cases just mentioned are limited, and properly limited, in *Bynum v. Board, etc., supra*, and *Board, etc., v. Gresham, supra*; but, even as limited, they are still broad enough to cover a case like this, where the services of a skilled and competent person are required to manage a steam engine made part of the jail by the act of the commissioners. In affirming that an engineer's compensation may be recovered from the county, we are not to be understood as expressly or impliedly deciding that compensation shall be paid to persons employed by the sheriff in taking care of the jail and the prisoners where such persons are not required to possess particular skill, or where the compensation for the services of such persons is covered by the allowance made to the sheriff for receiving, discharging, keeping, or boarding prisoners. No such question is involved in the case before us.

The claim in this instance is not for an extra allowance, or for fees or costs, but it is for the services of a person to fill a position requiring peculiar skill and knowledge, so that the case is not within the doctrine of such cases as *Wood v. Board, etc.*, 125 Ind. 270; *Board, etc., v. Barnes*, 123 Ind. 403; *Wright v. Board, etc.*, 98 Ind. 88.

Judgment affirmed.

Filed Jan. 9, 1892.

No. 15,420.

THE MIDLAND RAILWAY COMPANY ET AL. v. DICKASON
ET AL.

PRACTICE.—*Supreme Court.—Conclusions of Law.—Question, How Presented.*

-In order to present a question on the correctness of the conclusions of law of the trial court on the facts found, an exception to the conclusions of law must be taken at the time the decision is made; and it must be assigned as error in the Supreme Court that the court below erred in its conclusions of law.

130 164
137 267
130 164
140 298
130 164
159 242

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SAME.—*Objection not Raised Below.*—Where the exception is not to the conclusions of law, but to the rendition of the judgment, the appellant will fail.

JUDGMENT.—*Objection to Form of Judgment.*—*Waiver of.*—Where no motion to modify the judgment, or objection to its form is made in the court below, objections made to the form of the judgment in the Supreme Court will not be considered.

From the Tippecanoe Circuit Court.

H. Crawford and W. R. Crawford, for appellants.

A. D. Thomas, for appellees.

MILLER, J.—The appellees sued the appellants to recover the value of material furnished for the construction of its road, and to enforce a lien on its roadway, under the mechanic's lien act.

The cause was tried by the court, without the intervention of a jury, and at the request of the parties the court made a special finding of the facts and conclusions of law, upon which, subsequently, a judgment was rendered against the appellants.

The errors assigned in this court are as follows:

"1. The court erred in rendering judgment on the special finding.

"2. The court erred in rendering a personal judgment against the railway company without relief from valuation laws.

"3. The court erred in rendering any decree enforcing a lien and priority on the road in Montgomery county.

"4. The court erred in rendering a personal judgment for attorneys' fees, collectible without relief from valuation laws."

In order to present for review in this court the correctness of the conclusions of law, deduced by the court from the facts found, two things are necessary:

1. An exception to the conclusions of law must be taken at the time the decision is made.

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2. It must be assigned as error in this court that the court below erred in its conclusions of law.

The cases to this effect are numerous. We cite only the following: *Smith v. Davidson*, 45 Ind. 396; *Hull v. Louth*, 109 Ind. 315 (333); *Western Union Tel. Co. v. Trissal*, 98 Ind. 566; *Smith v. McKean*, 99 Ind. 101; *Johnson v. McCulloch*, 89 Ind. 270.

The transcript shows that the special finding was filed on February 9th, 1889. On the 15th of the same month the plaintiff moved the court for judgment on the special finding; and on the 28th of the month this motion was sustained, "to which ruling of the court the defendants except, and the court renders judgment accordingly."

This exception was not, as it should have been, taken at the time the court returned its conclusions of law; nor was the exception, when taken, to such conclusions of law, but to the rendition of a judgment in favor of the plaintiff.

The appellants having waived, by failing to except, all objections to the conclusions of law, it was not error for the court to render judgment for the plaintiffs in accordance with such finding and conclusions.

No motion to modify the judgment, or objection to its form, was made in the circuit court, and it can not be assailed in this court for the first time, on account of any of the objections stated in the assignment of error. *Johnson v. Prine*, 55 Ind. 351; *Walter v. Walter*, 117 Ind. 247; *Berkey, etc., v. Hascall*, 123 Ind. 502.

These objections are pointed out and urged upon our attention, by the appellees, as reasons why the judgment must be affirmed, and we are compelled to sustain them in their contention.

Judgment affirmed.

Filed Jan. 9, 1892.

Brauns v. Glesige.

No. 15,311.

BRAUNS v. GLESIGE.

130 167
134 611

PRACTICE.—Damages.—Omission to Aver.—Defect Cured by Verdict.—The omission of an averment of the amount of damages sustained is cured by the verdict.

SAME.—Damages.—Failure of Proof.—Injunction.—If there is no proof of damages, the court can only award nominal damages, even though the plaintiff be entitled to an injunction.

INJUNCTION.—Mandatory.—When May Issue.—If there be an unlawful invasion of the plaintiff's rights, irreparable and continuing in its nature, the court may issue a mandatory injunction on final hearing, and it may do so in extreme cases in the first instance.

SAME.—Apartment House.—Sale of Part.—Removal of Water-Pipe in Joint Service.—If the owner of a double apartment house, which is served by a single water pipe for domestic purposes in both parts of the house, sell or lease one-half of the house, such water-pipe being appurtenant thereto and essential to the enjoyment of the half sold, he may be restrained from afterwards removing such pipe, and be compelled to restore it.

From the Vanderburgh Circuit Court.

S. R. Hornbrook and *S. W. Curtis*, for appellant.

V. Bisch, for appellee.

OLDS, J.—One Louis B. Bichter was the owner of a lot in the city of Evansville upon which there was a two-story brick dwelling-house divided into two apartments, each having separate numbers, and constructed for use by two families, the hall entering into one apartment, and doors from the hall into the other. The house was supplied with water from the city water-works for use by the occupants, including the necessary water for a double water-closet, the water being furnished by the same pipes to both apartments. The appellee leased one of the apartments of the owner for a term of years. Afterwards, and before the expiration of the lease, the owner died testate, devising said real estate to his son, Louis W. Bichter, who also died testate, and by his will devised a part of said real estate to the appellant. The ap-

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pellee took possession of the premises under the lease, and has ever since held the same.

The complaint alleges the foregoing facts, and further alleges that the appellant has shut off the water from the building, and is about to stop appellee's access to his dwelling-rooms in the second story, and to take up and remove the fence dividing the lot, and designating the limits between the two apartments, and to bar appellee from the use of the water-closet for use by the tenants of said building, and, unless restrained, the appellant will deprive the appellee of the use and enjoyment of the premises so leased and now occupied by the appellee.

Appellant assigns as an error that the complaint does not state facts sufficient to constitute a cause of action.

There was no demurrer addressed to the complaint, and its sufficiency is first questioned by an assignment of error in this court.

We think the complaint is sufficient to bar another action, and no defect is pointed out which renders it insufficient to withstand an attack first made in this court by an assignment of error alleging its insufficiency. *Harris v. State, ex rel.*, 123 Ind. 272.

It is next contended that the court erred in overruling appellant's motion for a new trial.

The court assessed appellee's damages at \$50, and it is insisted by appellant that there is no allegation in the complaint authorizing the recovery of actual damages, and that there was no evidence introduced that appellee sustained any actual damage, and at most only nominal damages could be assessed.

The complaint alleges the facts showing that the appellant was about to shut off the water, and that he had actually stopped the water pipes and prevented the flow of water to the apartments occupied. There was a prayer for one hundred dollars damages, but no averment that the appellee had sustained damages in any specific sum by reason of the acts

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of the appellant. The complaint was sufficient to withstand a general demurrer for want of facts, and to bar another action. The omission of an averment as to the amount of damages sustained is cured by the verdict. It is a matter that may be supplied by proof. *Colchen v. Ninde*, 120 Ind. 88; *Chapell v. Shuee*, 117 Ind. 481; *Old v. Mohler*, 122 Ind. 594; *Harris v. State, ex rel., supra*.

There is no evidence of any actual damages, or that any amount of damages were sustained. The evidence all goes to the facts relating to the use of the premises, and the stopping of the water-pipes, and interference with the appellee's full and free use of the premises; and there is no evidence tending to show the amount of actual damage sustained, or that appellee had sustained any actual damage. Under the evidence in the case we do not think the court was authorized to assess more than nominal damages.

It is contended that the right to receive water through the pipes was a mere license, revocable at the will of the owner of the premises. The evidence shows that the premises were all owned by one person, and that while so owned the pipes were put in. The pipes connecting with and furnishing water to a part of the house occupied by the appellee, were put in by the appellee at his own expense, under an agreement with the landlord; and when put in they became a part of the real estate, and the appellant had no right to stop them up and shut off the flow of water to the premises occupied by the appellee.

The court made a mandatory order, requiring the appellant to open up the pipes and permit the flow of water to the premises occupied by the appellee. This was correct. The court had a right to order a mandatory injunction in such a case as the one at bar. Where there is an unlawful invasion of a party's right, irreparable and continuing in its nature, the court may issue a mandatory injunction, and this it may do in an extreme case in the first instance, as

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well as upon final hearing. 1 High on Injunctions (3d ed.), sections 2 and 708.

For the error of the court in assessing damages the judgment will have to be reversed, unless the appellee remit all except one dollar within thirty days from this date.

If the appellee remit all of the judgment for damages, except one dollar, within thirty days from this date, the judgment will be affirmed at costs of the appellee. On failure of the appellee to enter such remittitur within that time, the judgment is reversed, at costs of appellee.

Filed January 8, 1892.

No. 15,058.

SHONER v. THE PENNSYLVANIA COMPANY.

INTERROGATORIES.—*Presumption of Submission to Jury.*—If the record shows a request for answers to interrogatories in case a general verdict be returned, and a general verdict and interrogatories with answers be returned, it will be presumed that the court submitted such interrogatories to the jury.

SPECIAL FINDINGS.—*Irreconcilability.*—*Sufficiency to Overturn General Verdict.*—To overthrow the general verdict the special findings must be irreconcilably in conflict with it upon any reasonable hypothesis.

SAME.—*Reconcilable with General Verdict Under any State of Facts.*—*Evidence.*—A general verdict is not controlled by the special findings if such findings are reconcilable with each other under any supposable state of facts provable under the issues, without reference to the evidence.

SAME.—*Presumption in Aid of.*—The court will not presume any thing in aid of the special findings, but will make every reasonable presumption in favor of the general verdict.

SAME.—*When will Prevail.*—If the special findings can not be reconciled with the general verdict, the former must prevail.

NEGLIGENCE.—*When Question for Court.*—*When for Jury.*—Where the facts in an action for negligence are undisputed, and the inferences which may be drawn from them are unequivocal, and can lead to only one conclusion, the court will adjudge as a matter of law that there was, or was not, negligence; but if the facts are disputed or equivocal, and different inferences can reasonably be drawn from them, the question of negli-

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gence must be determined by the jury under the instructions of the court.

SAME.—Traveller Approaching Railroad.—Failure to Look.—Inferences Drawn by Court.—A traveller approaching a railroad with the intention of crossing is bound to know that to attempt to cross near and in front of a moving train involves danger; and if he does not look and listen the court will draw the inference that his act contributed to the injury.

SAME.—Servant Working at Crossing.—Right to Presume Signals will be Given.—Must Use Care to Avoid Injury.—A servant rightfully working upon the track of a railway is justified in assuming that those in charge of moving trains will obey an express mandate of the law requiring signals to be given at crossings; but this does not absolve him from the necessity of using reasonable care, proportioned to the dangers incident to his work and position, to avoid injury to himself.

SAME.—Rule Applicable to Travellers Approaching and to Servant Working on Track.—The rule applicable to a traveller approaching a track, requiring him to look, and attributing to him contributory negligence if he do not, is not applicable to a servant of the company on the track repairing it.

SAME.—Servant.—Presumption of Knowledge Arising from Showing His Acquaintance with Locality and Duty of Servants in Running Trains.—Where a servant is injured at a railway crossing by a moving train, which crossing he has known for several years, the courts will presume, in the absence of a showing to the contrary, that during these years the employees of the company, working at that point, had been observant of the duty of reciprocal care for the safety of each other which the law imposes upon them, and obedient to the law relative to the running of trains over crossings, and the injured servant with knowledge of such facts would be justified in acting on the assumption that such careful observance of duty would continue.

PRACTICE.—Judgment on Reversal.—When will not be.—Order Entered on Interrogatories.—On reversal of a judgment entered on the special findings of the jury, the Supreme Court will seldom order the entry, by the lower court, of a judgment on the general verdict; but will order that a new trial be granted, unless the entire record below is in the transcript and affirmatively shows that no injury would be done the appellee by entry of a judgment on the verdict.

SAME.—Rules of Practice Must be General.—Rules of practice must be general, and should be framed with a view to insuring, so far as possible, just results in all cases, and minimizing the danger of injustice being done to parties in any case.

From the Fulton Circuit Court.

J. D. McLaren and E. C. Martindale, for appellant.

J. Brackenridge and A. Zollars, for appellee.

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MCBRIDE, J.—The appellant was a section hand in the service of the Terre Haute and Indianapolis Railroad Company, known as the "Vandalia" road.

The track of the Vandalia road crosses that of the appellee "at grade" at Plymouth, Marshall county, and the crossing of the two tracks was embraced in the section on which the appellant worked. On the morning of December 5th, 1887, the appellant and a co-employee, named Sullivan, were engaged in making some repairs to the track at the crossing, and while thus engaged were struck by a baggage-car which was being pushed over the crossing by one of the appellee's locomotives. Sullivan was killed, and the appellant was severely injured. This suit was to recover for the injuries thus sustained by the appellant.

The trial resulted in a general verdict in his favor. Interrogatories were submitted to the jury by both parties, and were answered. The court, on motion of the appellee, rendered judgment in its favor on the answers to interrogatories, notwithstanding the general verdict. The appellant insists that this was error, for the following among other reasons:

1st. That the interrogatories are not properly in the record, and can not be considered as affecting the general verdict.

2d. There is no such inconsistency between the answers to interrogatories and the general verdict as will justify disregarding the latter.

The record shows that both parties submitted interrogatories, and asked that the court require the jury to answer them if they returned a general verdict. It does not affirmatively appear from the record that the court did submit them and instruct the jury to answer them, but the record shows that the jury did answer them. The case of *Cleveland, etc., R. W. Co. v. Bowen*, 70 Ind. 478, cited by the appellant, and the cases of *Hervey v. Parry*, 82 Ind. 263, *Aiken v. Ising*, 94 Ind. 507, and *Hamilton v. Shoaff*, 99 Ind. 63,

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would sustain appellant's contention, but those cases have been overruled on that proposition by the later case of *Frank v. Grimes*, 105 Ind. 346.

Section 546, R. S. 1881, provides that "In all actions, the jury, unless otherwise directed by the court, may, in their discretion, render a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. This special finding is to be recorded with the verdict."

The record, showing as it does, that the parties in compliance with the statute, requested the court to require the jury to answer the interrogatories, if they returned a general verdict, and that the jury did return a general verdict, and did also, in fact, answer the interrogatories, it will be presumed that the court did its duty, and instructed and required the jury to answer them, unless the contrary is affirmatively shown by the record. We fully approve the rule as laid down in *Frank v. Grimes*, *supra*. The interrogatories and their answers are properly in the record.

The law is well settled that to justify overturning the general verdict, and rendering judgment on the special findings, there must be irreconcilable conflict between them. If the special findings can, upon any reasonable hypothesis, be reconciled with the general verdict, the latter will control, and the court can not render judgment against the party who has the general verdict in his favor. This has been so many times decided, and never even questioned, that it is unnecessary to cite any authorities in its support. It is also equally well settled that a general verdict will not be controlled by special findings, if they are reconcilable with each other under any supposable state of facts, provable under the issues, without reference to the evidence actually adduced on the trial. *Stevens v. City of Logansport*, 76 Ind. 498; *Pittsburgh*,

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etc., *R. W. Co. v. Martin*, 82 Ind. 476 ; *Higgins v. Kendall*, 73 Ind. 522 ; *Louthain v. Miller*, 85 Ind. 161 ; *Amidon v. Gaff*, 24 Ind. 128.

The court will not presume anything in aid of the special findings, but will make every reasonable presumption in favor of the general verdict. *Pittsburgh, etc., R. W. Co. v. Martin, supra.*

When, however, they can not be thus reconciled, the special findings must prevail. *Hartman v. Flaherty*, 80 Ind. 472 ; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440 ; *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491 ; *Chicago, etc., R. W. Co. v. Hedges*, 118 Ind. 5 ; *Frank v. Grimes, supra.*

To justify a recovery by the appellant, he was required to show that he sustained the injury complained of by the negligence of the appellee, and that he was himself free from negligence which contributed to the injury. The alleged inconsistency between the general verdict and the answers to interrogatories is, that the latter show contributory negligence. If this is true, the judgment of the circuit court was right, as contributory negligence on his part would be an absolute bar to a recovery, and if, as alleged, contributory negligence was shown by the special findings, there was such irreconcilable conflict as made it the duty of the court to disregard the general verdict and render judgment in favor of the appellee.

It is averred in the complaint that the "Vandalia" road was built after that of the appellee, and that the former company was required to maintain and keep in repair the tracks of both roads at the crossing ; that on the morning in question the appellant and Sullivan were ordered by their section boss to make some needed repairs on the appellee's main track at the crossing, by tightening some bolts which had become loose ; that while they were engaged in doing so, some of the appellee's servants were engaged in moving a locomotive and some freight cars on a side-track about eight feet south of where they were at work, thus making a great deal of noise ;

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that to get out of the way of the freight their section boss was compelled to run his hand-car to a point where he was separated from them by the moving freight train, and that while they were bending down, engaged in tightening the bolts, other employees, with a locomotive and a baggage car, moved without noise, signal or warning upon the main track, and pushed the baggage car against and over them, killing Sullivan and injuring the appellant. The engine and baggage car belonged to an accommodation train which was run daily from Plymouth to Fort Wayne and back, and when the accident occurred it was running backward toward the east to reach a water plug for the purpose of taking water. The appellant and Sullivan were facing east, or northeast, and the engine and baggage car approached them from behind.

No question is made in the argument over the negligence of the appellee's servants, and the case, as it is presented to us must be considered on the assumption that the appellant's injuries were caused by their actionable negligence. The only question for us to consider is, do the special findings show contributory negligence on the part of the appellant?

The only interrogatories and answers bearing on the question of contributory negligence are as follows:

Of those submitted by the appellant:

"10. Did not the plaintiff look along the main track of the defendant's railway, both east and west of the crossing, before he commenced work at the crossing on the morning he was injured, and did he not thus learn that the main track was clear so far as he could see, both east and west of the crossing? Ans. Yes."

Of those submitted by the appellee:

"5. Had not Shoner been at work on said crossing only about three or four minutes before he was injured? Ans. In our opinion five or six minutes."

"7. Does not the track of the defendant run east and west through the city of Plymouth? Ans. Yes."

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"10. Is not the defendant's track straight, and in full view to one standing on the crossing where Shoner was hurt, for a mile or more west of said crossing? Ans. Yes.

"11. Was not the engine and baggage car that struck Shoner moving east on defendant's main track? Ans. Yes.

"12. Was not the engine and baggage car that struck Shoner, at and immediately before the collision, running at the rate of about two to four miles an hour? Ans. Yes."

"14. Could not Shoner, by looking west along defendant's main track, have seen the engine and car approaching for a distance of 700 to 800 feet from the crossing where he was hurt? Ans. Yes.

"15. Could not Shoner, by looking west along defendant's main track, have seen the engine and car approaching that struck him in ample time to have gotten out of the way and have avoided the injury? Ans. Yes.

"16. After Shoner had commenced working on the crossing, did he look west for the approaching car at all? Ans. No."

It is also shown by other answers that the appellant had worked on the same section for three years, and had for years resided within three blocks of the crossing, and that the accommodation train to which the engine and baggage car belonged had been run at the same time for several months prior to the time the appellant was injured.

The appellee insists that upon these facts the court must say as matter of law that the appellant was guilty of contributory negligence; that it must be assumed that the length of time the appellant had worked on the section, and had resided in that immediate vicinity, had made him familiar with the times of running trains on that part of the road; that the place where he was required to work on the main track of the road necessarily exposed him to such dangers as required him to exercise active vigilance for his own protection; and that, under the circumstances, his failure to look after he commenced work was *per se* negligent.

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In cases involving questions of negligence, the rule is now settled that, where the facts are undisputed, and the inferences which may be drawn from them are not equivocal, and can lead to but one conclusion, the court will adjudge as matter of law that there is, or is not, negligence. While in cases where the facts are disputed, or where they are equivocal, and different inferences can reasonably be drawn from them, the question of negligence must be determined by the jury under proper instructions. *Baltimore, etc., R. R. Co. v. Walborn*, 127 Ind. 142; *Mann v. Belt R. R., etc., Co.*, 128 Ind. 138, and authorities cited in each. See, also, *Rogers v. Leyden*, 127 Ind. 50, where a full citation of authorities will be found.

The general verdict in appellant's favor necessarily involved a finding that he was free from contributory negligence. Bearing in mind the rule that every reasonable presumption will be indulged in favor of the general verdict, and that the antagonism between it and the special findings must be so great that it can not be removed by any evidence legitimately admissible under the issues, can it be said that the facts specially found are unequivocal, and that no inference but that of negligence can be drawn from them?

When a traveller approaches a railroad with the intention of crossing it, he is bound to know that to attempt to cross near and in front of a moving train involves more or less of danger. If he is so heedless of his personal safety that he braves the danger, or so careless that he does not use the senses nature has given him to look and listen, that he may learn if there is danger, only one inference, that of negligence, can be drawn from his conduct.

But the conduct of the appellant must be measured by a different standard. He was on the road rightfully, and in the discharge of duty, and while he was not absolved from the necessity of being vigilant, and careful to avoid danger, he had a right to rely, also, to some extent, on the care and

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vigilance of others engaged in using the same road. Those who are engaged in the active work of operating a railroad, or anything else involving danger to the operatives, are not only required to be watchful and vigilant to conserve their own safety, but owe a similar duty to all others whose duties expose them to the same dangers; and they have, at the same time, a right to rely, to some extent, on the care of each other, and to assume that each one thus employed will use reasonable care to avoid injuring the others. *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588.

The work the appellant was doing was on the crossing of the two roads. The law makes it a felony for any engineer of any railroad, over which passengers are transported, to run his locomotive over such a crossing without first bringing his locomotive to a full stop, and ascertaining that there is no other train, or locomotive, approaching, and about to pass upon and over such crossing. Section 2172, R. S. 1881. The appellant would be justified in assuming that any engineer approaching the place where he was working would obey this express mandate of the law, and that his presence would thereby be disclosed, and pains taken to avoid injuring him.

While this would not absolve him from the necessity of using reasonable care, proportioned to the dangers incident to his work, and the place where he was working, it is, of course, apparent that the rule applicable to the traveller on the highway, approaching a railroad crossing, can not be applied to him. His duty requires him to give attention to his work. Can the court say, as matter of law, how often he should turn from his work to look for approaching trains? He looked when he commenced work, and saw that the track was clear. He then worked for five or six minutes without again looking, and was hurt. Can the court say, under such circumstances, that the inference of contributory negligence is conclusive, and sufficient to overthrow the general verdict? We think not. The fact that the appellant had worked on that same section, and had resided in the imme-

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diat vicinity for three years, only strengthens the conclusion we have reached. In the absence of any showing to the contrary, it will be presumed that during those years the employees of the appellee, working at that point, had been observant of the duty of reciprocal care for the safety of each other, which the law imposes on them, and had also obeyed the law requiring the stopping of trains, and observation of the track before attempting to run over the crossing. If so, his knowledge thus acquired would indicate that the safest place for a workman, on the line of the track, would be the crossing, as he would there be reasonably certain to be seen and warned in time to escape danger.

The following are among the authorities which, in some measure, sustain the conclusion we have reached. *McMarshall v. Chicago, etc., R. W. Co.*, 80 Iowa, 757; *Chicago, etc., R. W. Co. v. Dunleavy*, 129 Ill. 132; *Goodfellow v. Boston, etc., R. R. Co.*, 106 Mass. 461; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261; *Stevens v. City of Logansport*, *supra*.

The court erred in sustaining the appellee's motion for a judgment on the special findings, notwithstanding the general verdict.

The judgment is reversed, with instructions to the Fulton Circuit Court to grant a new trial.

Filed Oct. 8, 1891.

ON PETITION FOR A REHEARING.

McBRIDE, J.—The appellee has asked for a rehearing. Reconsideration of the case only confirms us in the correctness of the conclusion reached. The petition for a rehearing is therefore overruled. The appellant asks for a change of the mandate, and that, instead of ordering a new trial, the court direct the Fulton Circuit Court to render judgment in appellant's favor on the general verdict.

While it is possible that by such an order no injustice would be done, and that substantial justice *would* be done, the possibility of injustice as the result of such a mandate is

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too great to justify the court in making it. We are not able to say from the record that there may not have been errors on the trial against the appellee which, if presented by a motion for a new trial, would have compelled a reversal.

When the court below sustained the motion for a judgment in the appellee's favor on the answers to interrogatories, notwithstanding the general verdict, there was no longer reason or ground for a motion by it for a new trial.

As matter of course, also, there was no reason for bringing into the record by bills of exception any errors which may have been committed on the trial, and of which the appellee could only avail itself by a motion for a new trial and by bills of exception. Rules of practice must be general, and should be framed with a view to insuring, so far as possible, just results in all cases, and minimizing the danger of injustice being done to parties in any case.

It is true that in the record, as it comes to us, we find nothing to indicate that the trial was not fair, and that a correct result was not reached by the general verdict. Nor do we find any thing to indicate that there was any error against the appellee. We can not, however, close our eyes to the fact that with the sustaining of the motion for a judgment *non obstante* the proceedings closed, and that the appellee could not thereafter file its motion for a new trial, and thus bring possible errors into the record.

Section 660, R. S. 1881, provides that "When the judgment is reversed, in whole or in part, the Supreme Court shall remand the cause to the court below, with instructions for a new trial, when the justice of the case requires it."

In Buskirk Practice (p. 334), it is said that "A cause is never remanded with particular instructions relative to the judgment to be rendered, unless all the facts necessary to a complete and final determination of the cause are in the record." See, also, Works Pl. and Prac., section 1106. That can not be said in a cause terminating as this did. If the

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motion for a judgment *non obstante* had been overruled, it would be different.

Petition to change mandate overruled.

Filed Jan. 9, 1892.

No. 15,174.

SPENCER v. THE OHIO AND MISSISSIPPI RAILWAY COMPANY.

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170	376

NEGLIGENCE.—*Inexperienced Servant.—Presumption of his Exercise of Care.*—

One employing an inexperienced servant has a right to presume that he will exercise some degree of care to avoid injury, and that he will not place himself in a dangerous position, unless that position is the one he is ordered to occupy.

SAME.—*Servant Engaged in Cleaning Railway Locomotive.—Going Under it.*—

An inexperienced servant employed in cleaning a locomotive, who gets under it for that purpose without first notifying the person in charge of it of his intention, is guilty of contributory negligence.

SAME.—*General Allegation of Care Overcome by Specific Allegations Showing Contributory Negligence.*—

The general averment of a want of negligence on the part of the plaintiff is controlled by the specific allegations of fact which show that he was negligent.

SAME.—*Incompetent Fellow-Servant.—Ignorance of Plaintiff of His Incompetency.*—

In order to hold a master liable for the incompetency of his servant, whom he knows to be incompetent, when such servant has inflicted an injury on another servant, the latter must aver and show that he himself was ignorant of the fact that his fellow-servant was incompetent.

MASTER AND SERVANT.—*Fellow-Servants.—Engineer and Cleaner of Locomotive.*—

A servant in charge of a locomotive in a yard, and another servant engaged in cleaning it, are fellow-servants.

From the Jackson Circuit Court.

W. K. Marshall, for appellant.

J. B. Brown, W. M. Ramsey, L. Maxwell, R. Ramsey and E. Barton, for appellee.

MILLER, J.—The sole question is whether the amended

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complaint states a cause of action. It alleges, in substance, that on December 12th, 1888, the company employed plaintiff to work in her round-house and yard adjoining, at Seymour, and that a part of his duty was to clean her engines of ashes and fire when they came into the yard; that he was required to work under the orders of other men until he should learn the business himself, to wit, under the directions of James Sutton, David Quinn and Charles Collmeyer, plaintiff himself being inexperienced; that on the night of December 28th, 1888, engine 133 came into the yard, and while it was standing on a switch-track to be cleaned, he was ordered by the above-named persons to go with one of them to clean it; that in order to do said work it was necessary to take off a valve held by a chain that was broken, and was tied by another chain; that when plaintiff untied the chain the valve dropped down upon the ground, under the engine, midway between the rails, making it necessary for plaintiff to place his head, shoulders, arms and the upper part of his body under the engine boiler to get the valve, which he did; that while he was thus getting the valve, the engineer, who knew he was cleaning the engine, carelessly and negligently started it and ran it upon plaintiff, thus causing his injuries; that the condition of the chain and valve rendered the machinery dangerous and unsafe, and exposed plaintiff to unnecessary hazard; that it had been in that condition for more than ten days, and defendant knew it was in said broken and unsafe condition, and negligently permitted it to remain so, and plaintiff did not know that it was broken and unsafe until he went to said engine to clean it; that defendant knew of plaintiff's inexperience, and failed to give him any warning of the dangers of the work; that the person in charge of the engine, and running it while in the yard, was in defendant's employ, and had been for more than a year prior to that time, and was negligent in the performance of his duties, and was especially negligent in the performance of his said duty with said engine, and was not a skilled or

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practical engineer, and was incompetent and only a yard hand, without experience in running or managing locomotive engines, and was by defendant's orders put at said service; that the defendant knew he was negligent and careless, and defendant was negligent and careless in employing him, and retaining him in its service; that plaintiff was without fault or negligence in all he did as aforesaid, and received his said injuries without fault or carelessness on his part.

It appears from the allegations of the foregoing complaint that the fact that the chain which held the valve was broken was not the proximate cause of the injury. It was the starting of the engine while the appellant was under it that caused the injury complained of. *Pease v. Chicago, etc., R. W. Co.*, 61 Wis. 163.

It was not negligence on the part of the persons under whose direction he was working to order him to clean the engine, which at the time was standing still on the track. They had the right to presume, although he was inexperienced in the work, that he would exercise some degree of care to avoid injury. They did not order him to go under the engine, or, for any thing that appears in the complaint, have any reason to suppose that he would place himself in that dangerous position. *Atlas Engine Works v. Randall*, 100 Ind. 293.

It is not alleged that he notified the engineer or other persons in charge of the engine that he was going under it, or that they had any notice or knowledge of that fact. Under these circumstances it does not appear that the employees in charge of the engine were guilty of negligence in putting it in motion; but it does appear that the appellant was guilty of negligence, contributing to the injury, in placing himself in this dangerous position without first warning the engineer. It was the assumption of a needless risk on his part. The general averment of want of negligence on his part is controlled by the specific allegations of fact which show that he

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was negligent. *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43.

If there was negligence on the part of the employees of the company, either in ordering him to clean the engine, or of the engineer in starting the engine, it was the negligence of a co-employee, for which the appellee is not responsible. *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Ewald v. Chicago, etc., R. W. Co.*, 70 Wis. 420; *Pease v. Chicago, etc., R. W. Co.*, *supra*; *Bergatron v. Staples*, 82 Mich. 654.

The allegations charging that the servant in charge of the engine was not a skilled or practical engineer, but was incompetent, and that the defendant was negligent and careless in employing and retaining him in its service, falls short of taking the case out of the general rule, that the master is not liable for injuries caused by the negligence of a co-employee. In order to do so it must be alleged, in addition to the charges of negligence on the part of the master, that the plaintiff was himself ignorant of the incompetency of his fellow-servant. *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Rogers v. Leyden*, 127 Ind. 50.

We are unable to find in this complaint any averment negating knowledge on the part of the appellant of the alleged incompetency of the engineer.

We find no error in the record.

Judgment affirmed.

Filed Jan. 26, 1892.

Reagan et al. v. Sheets et al.

No. 15,532.

REAGAN ET AL. v. SHEETS ET AL.

DESCENT.—*Second and Childless Wife.—Partition, Effect on Widow's Title.—Burden to Show Widow Had Greater Interest than Fee for Her Life.*—After her husband's death, in a partition proceeding between his second and childless wife and his children by his first wife, there was a finding that husband and father died seized in fee of certain real estate, leaving surviving him the widow and children, reciting that the widow was "entitled to an undivided one-third part of said real estate in fee simple as such widow," the children entitled to the remaining two-thirds, followed by the appointment of commissioners in partition, and a direction that they "assign and set apart to" the widow "a one-third part, in value, of said real estate, to have and to hold to her and her heirs forever." On the death of the widow, in a suit to quiet title, her heirs claimed an interest in fee simple to the land awarded her by the commissioners, by force of the terms of the decree. Only the decree of partition was introduced in evidence, the papers having been lost, and no parol proof made of their contents.

Held, that the decree in partition gave the widow an interest only for her life, and that her heirs had no interest in the land.

Held, also, that the burden was on her heirs, the defendants, to show that she had a greater interest in the land than an interest for her life as against the heirs of her husband.

From the Morgan Circuit Court.

G. A. Adams, J. S. Newby and W. R. Harrison, for appellants.

F. P. A. Phelps, A. M. Cunning and M. H. Parks, for appellees.

COFFEY, J.—This was an action brought by the appellees against the appellants, in the Morgan Circuit Court, to quiet title to the real estate described in the complaint.

Upon issues formed the cause was tried by a jury, resulting in a verdict for the appellees, upon which the court, over a motion for a new trial, rendered judgment.

It is urged here, as a reason for reversing the judgment of the circuit court, that it was error to overrule the motion of the appellants for a new trial.

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It is admitted by the parties that Reason Reagan died in the year 1854, the owner in fee of the land in dispute, together with other lands, leaving Mary Reagan as his widow, she being a second wife, by whom he had no children. She departed this life in the year 1886. The appellants are the children of Reason Reagan by a former marriage, and the descendants of such of his children as have departed this life since his death.

The land in controversy was set off to Mary Reagan in a partition suit in the Morgan Common Pleas Court in the year 1856, and was conveyed by her to John Sheets, the father of the appellees in this case.

Section 2487, R. S. 1881, provides that "If a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children."

By the terms of this statute the land in dispute is the property of the appellants, unless something has occurred to deprive them of the title held by their ancestor, Reason Reagan. The burden of showing that they have thus been deprived of their right rests upon the appellees. It is claimed by them that appellants have been deprived of their claim to this land by reason of an agreement entered into between Reason Reagan and his wife, Mary Reagan, followed by a decree of the common pleas court of Morgan county in the partition proceeding above referred to.

It is claimed by the appellees that a verbal agreement was made between Reason Reagan and his wife, to the effect that, in consideration that she would join with him in the conveyance of certain land to his children, she should, upon his death, have an absolute title to what was known as the home farm, consisting of forty-five acres, and which includes the land now in dispute; that, pursuant to such agreement, the decree in the partition suit, under which the land was set off to her, was so drawn as to confer such title, and for that reason

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she took the land as a purchaser from Reason Reagan, and not by descent.

It may be remarked of the contract above mentioned that by reason of the statute of frauds it was not enforceable. There is no claim that any such delivery of possession took place under the contract as would take the case out of the statute and enable Mary Reagan to enforce specific performance. *Neal v. Neal*, 69 Ind. 419.

If, therefore, the appellants have been deprived of their right to inherit this land from Mary Reagan, it is by reason of the decree in the partition suit under which the land was set off to her.

It was admitted on the trial of the cause that the pleadings in the partition suit were destroyed by fire in the year 1876. Neither party attempted to prove the contents of these pleadings, and for this reason we know nothing of the nature of the issues between the parties except what can be obtained from the docket entries.

Nevertheless, it is claimed by the appellees that in that suit it was decreed by the court, by agreement of the parties, that Mary Reagan should have the land in dispute by an absolute fee simple title, but this claim is wholly without proof.

As we understand the brief for the appellees, the only matter relied upon by them as tending to prove their claim consists of recitals in the decree for partition.

So much of the decree as is relied upon by the appellees is as follows :

“And now come the plaintiffs, by their attorneys, and defendant, by her attorneys, and this cause comes on to be heard upon the complaint, the answer thereto and the facts agreed upon between the parties, and the court thereupon finds that the said Reason Reagan departed this life intestate, seized in fee of the following real estate in Morgan county and State of Indiana, to wit: * * * *

“And the court further finds that said Reason Reagan left surviving him the said defendant, Mary Reagan, his widow,

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who is entitled to an undivided one-third part of said real estate in fee simple as such widow."

There is a finding that the children of Reason Reagan, naming them, are entitled to the remaining two-thirds of the land described in the decree, followed by the decree for partition. After the appointment of the commissioners the decree proceeds as follows: "And they are directed to assign and set apart to said Mary Reagan a one-third part, in value, of said real estate, to have and to hold to her and her heirs forever."

It is argued by the appellees that the record entries above set out prove that the claim of Mary Reagan to an absolute title to the home farm was involved in the case, and was settled in her favor.

There is nothing in the agreement recited to warrant such an inference.

In the absence of a showing to the contrary, the legal inference is that the agreement was such as to warrant the finding of the court which follows, namely, that Reason Reagan died seized in fee of the land described in the petition, and that he left Mary Reagan as widow, and the plaintiffs in that case as his children and heirs at law. It can not be assumed, in the absence of proof, that the parties agreed to matters not embraced in findings of the court.

There is nothing in the decree inconsistent with the claim of the appellants in this case, for the interest of Mary Reagan in the land of which her husband died seized was a fee simple interest. *Utterback v. Terhune*, 75 Ind. 363; *Hendrix v. McBeth*, 87 Ind. 287; *Bryan v. Uland*, 101 Ind. 477.

The land descends to her heirs, but the statute which creates her interest in the land declares that the children of the husband through whom she inherits shall, as to such land, become her heirs. Her conveyance of the land to a third party can not affect the rights of the children by a former wife. *Bryan v. Uland*, *supra*; *Slack v. Thacker*, 84 Ind.

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418; *Thorp v. Hanes*, 107 Ind. 324; *Avery v. Akins*, 74 Ind. 283.

Not only does the decree before us fail to show that Mary Reagan took the land in controversy as a purchaser from her husband, but, we think, it conclusively shows the contrary. It shows that it was set off to her as the widow of Reason Reagan.

The decree does not direct the home farm to be set off to her, but directs that there be set off to her one-third in value of all the land of which her husband died seized, including an eighty-acre tract to which her husband had executed a title bond during his lifetime. She did not, in fact, receive the whole of the home farm, which consisted of a tract of forty-five acres, but received thirty-five acres only of that tract. In view of what is shown by this record, unexplained by evidence, we think the verdict of the jury is not supported by the evidence.

Without any evidence as to what was embraced in the issues in the partition suit, or in the terms of the agreement under which the cause was submitted to the court for trial, except such as is found in the record, the court, in effect, by its instructions, left the construction of the record to the jury.

This, we think, was error. The construction of the record, under these circumstances, was for the court. *Turner v. First Nat'l Bank, etc.*, 78 Ind. 19; *Zenor v. Johnson*, 107 Ind. 69.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed Jan. 26, 1892.

Allen v. Gavin, Administrator.

No. 15,393.

ALLEN v. GAVIN, ADMINISTRATOR.

130	190
155	151
155	800

130	190
165	49

PRACTICE.—*Precipe on Appeal.—Construction.—Incidental Entries and Distinct Papers.—Precipe Part of Record on Appeal.*—A liberal construction will be given to the *precipe* on appeal, and incidental entries will be deemed impliedly embraced in the specific directions. The *precipe* is a part of the record on appeal. Section 649, R. S. 1881.

SAME.—*Omission of Parts of Record.—Precipe.—Effect.*—A party who appeals must present a proper transcript, and if he directs in his *precipe* filed with the clerk below what shall be incorporated in it, and his directions omit independent papers or entries essential to present the questions involved below, the appeal will be dismissed or the judgment below affirmed.

SAME.—*Burden on Appellant to Show Prejudicial Error.*—Error to be available on appeal must clearly appear in the record, without the aid of any extrinsic matter, and it must also appear from such record that the error was probably prejudicial to the appellant.

From the Wells Circuit Court.

E. R. Wilson and J. J. Todd, for appellant.

L. Mock and A. Simmons, for appellee.

ELLIOTT, C. J.—The appellee's counsel stoutly contend that the transcript "presents nothing for the decision of this court." In support of their position they assert, as one of the premises of their argument, that where the appellant's counsel direct what parts of the record below shall be copied into the transcript the clerk must obey the direction, and that only such entries and papers as are embraced in the *precipe* are properly parts of the record on appeal. This is undoubtedly true, but a liberal construction will be given the *precipe*, and incidental entries (not, however, independent entries, or distinct papers) will be deemed to be impliedly embraced in the specific directions. *Reid v. Houston*, 49 Ind. 181. To the statement of counsel may be added the further statement that a party who appeals must present a proper transcript, and where he directs what shall be incorporated in it the

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fault is his if he fails to secure and file such a transcript as fully and clearly presents the questions he asks the court to consider and decide. *Morningstar v. Musser*, 129 Ind. 470, and cases cited. As the statute confers upon the party who appeals the right to direct what papers and entries shall be embodied in the transcript, it necessarily follows that if his direction omits papers or entries essential to a full understanding and proper decision of the case, the appeal will be unavailing. In further support of their position counsel say that "error to be available must clearly appear in the record, without the aid of any extrinsic matter." They cite *Hudson v. Densmore*, 68 Ind. 391; *McCormack v. Earhart*, 72 Ind. 24; *Martin v. Martin*, 74 Ind. 207. This is an accurate statement of the law, as far it goes, but it does not go quite far enough, inasmuch as, to make error available on appeal, it must appear from the record that the error was prejudicial to the appellant, or was probably prejudicial. This doctrine has been asserted in many cases. *Morningstar v. Musser*, *supra*, and authorities cited. If, therefore, the appellee's counsel are right in asserting that the record does not make the alleged error manifest, the appeal must fail. Having ascertained and decided, as we are required to do, that the appellee's counsel have correctly stated the law, all that remains to do is to ascertain whether they have made a correct application of the law.

The *precipe* is part of the record on appeal, inasmuch as the statute requires the clerk "to append" the written direction to the transcript. Section 649, R. S. 1881. We must, therefore, examine the *precipe* to determine whether the necessary papers and entries are in the record. But, while we can ascertain what papers and entries are in the record from an inspection of the transcript and the *precipe*, we can not determine whether the record is sufficient to present the questions argued without stating how the questions arose, and giving the general outlines of the controversy, so that it is necessary to make a synopsis of the case. This we do

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by saying that in November, 1885, John H. Hoover sold to James M. West eighty acres of land, and, to secure the unpaid purchase-money, Hoover executed a promissory note to West, reciting the consideration for which it was given, and specifically describing the land purchased of Hoover; West died intestate, Gavin became the administrator of his estate, and Allen, the appellant, who had become the owner of the note, filed it as a claim against the estate of the decedent; other claims, amounting to eight hundred dollars, were also filed; the personal estate of the decedent amounted to \$786.66, out of which the widow was entitled, under the law, to \$500, leaving a balance in the hands of the administrator of \$286.66 to be applied to the payment of debts; partition proceedings were instituted; the land was ordered to be sold; it was sold for \$425; this sum the administrator applied generally to the payment of debts and to the payment of the widow; subsequently the estate was declared insolvent.

In speaking of the matters concerning the acts of the administrator, we may remark by the way, appellant's counsel say, "All which was shown by a final settlement report filed by the administrator." Returning from this transient digression, and resuming our synopsis, we quote from appellant's brief the following statements: "The final settlement was set for hearing, whereupon Stephen Allen filed his exceptions, and notice was given; on the day set for its hearing the report and exceptions were submitted to L. P. Milligan, special judge, for hearing and decision, together with what was termed an 'interpleader proceeding,' that had in the meantime been instituted by Gavin." The judge took the matter under advisement for several days, and while announcing his decision Gavin interposed an objection that the "interpleader proceeding" was not before him for decision, and a continuance upon the interpleader was asked and obtained, and thereupon Allen's exceptions were sustained. Subsequently an application was filed before another special judge, C. W. Watkins, to set aside the judgment of the

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former special judge. The application was sustained, and the judgment vacated. Counsel for the appellant, in opening their argument, say that "We regret to say that by some sort of singular coincidence the final settlement report of Gavin and Stephen Allen's exceptions thereto have disappeared from the files." Their claim for a reversal, as we understand their brief, is that the administrator erred in treating their claim as a general one, and not as a lien upon land. It seems clear to us that without the report of the administrator no decision upon the merits can be made, and that the whole controversy is as to whether the report shall stand or fall. The main issue was made by the exceptions to the report, and without the report and the exceptions it is impossible to determine whether there was merit in the appellant's exceptions or wrong in the proceedings of the administrator. This is the view taken of the case by the Appellate Court, as it transferred the case to this court upon the theory outlined by us. *Allen v. Gavin* (4 Ind. App.), 29 N. E. Rep. 363.

Nor can it be determined that the last special judge erred in vacating the order of his predecessor. The presumption is that he did not err, and, in the absence of the report and the exceptions, that presumption stands unrefuted. The *precipe* does not call for the final report and exceptions, nor are they in the record.

In such cases as this the court may, at its option, either affirm the judgment or dismiss the appeal, and we deem it best to dismiss the appeal.

Although the point is not made by counsel, we think it proper to say that the order of the last special judge was not a final judgment, and, hence, not appealable. The fact that there was no final judgment appears from the statement of appellant's counsel, that "Judge Watkins sustained Gavin's motion and set aside said orders and judgment of said special judge, Milligan, from which decision this appeal is taken."

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It is perfectly clear, upon counsel's statement, that the appeal is not from a final judgment.

Appeal dismissed.

Filed Nov. 23, 1891; petition for a rehearing overruled Jan. 26, 1892.

 No. 15,374.

BECHTOLD v. LYON.

AGENT.—*Goods Damaged in Shipping by Negligence in not Protecting them while Waiting on Wharf for Transportation.*—A. and B. entered into a written contract whereby A. agreed to furnish certain goods and B. agreed to sell them, make weekly reports, and after paying the necessary costs, they were to divide the net profits, the goods to remain the property of A., and B. to ship them to him whenever A. desired to close out the business. A. retained the right to control the business. Sometime after the business was commenced, A. wrote B. and requested him to ship the goods to him by boat. A. packed the goods and delivered them at the wharf to C., who was in charge and engaged in shipping goods by a certain line of boats, but he was not the agent of said line and had no authority to bind it. C. signed a receipt for the goods. They remained unprotected on the wharf all night and were shipped by C. on the first boat, but during the night they were damaged by rain, because of their unprotected condition.

Held, that B. was liable for the damage, that C. was his agent and not the agent of A. nor of the boat line.

GUARANTY.—*Notice of Acceptance.—When Necessary.*—It is not necessary that a guarantor should be notified of the acceptance of a contract of absolute guaranty when such contract is contemporaneous with or subsequent to the principal contract and which guaranty contract is not a mere proposition to become responsible in case credit is extended, or a contract is thereafter to be entered into on the faith of such guaranty contract.

From the Posey Circuit Court.

S. B. Vance and W. P. Edson, for appellant.

A. Gilchrist, C. A. De Bruler, G. V. Menzies and E. M. Spencer, for appellee.

OLDS, J.—The appellee, Michael Lyon, was a clothing

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merchant, in the city of Evansville, Indiana, and on the 8th day of July, 1886, he and one R. Ferriman entered into an agreement, of which the following is a copy :

“EVANSVILLE, July 8, 1886.

“M. Lyon agrees to furnish R. Ferriman with a stock of clothing and furnishing goods, to be sold in Shawneetown, Illinois. The goods all to be sold strictly for cash—credit is not to be given any one under any circumstances. Whenever the business fails to pay a profit each month above current expenses, the business to be discontinued at the option of M. Lyon. Each and every article sold is to be entered in a cash book, and the lot-number and cost of each article, and the price sold for, are to appear in the daily sales. If any goods are missing whenever an account of stock is taken, the cost of any goods missing is to be paid by R. Ferriman, as M. Lyon is to suffer no loss on account of any goods not accounted for in the sales.

“R. Ferriman is to give close and careful attention to the business, and in consideration of his services he is to receive one-half of the net profits after all the necessary expenses of running the business are deducted.

“M. Lyon is to furnish the goods, and the profits and losses are to be equally divided. R. Ferriman is to receive no salary, as one-half of the profits is to be his compensation for his services.

“The stock is to be kept constantly insured for its full value.

“R. Ferriman is to forward to M. Lyon, every Monday during the year, a statement giving the article, lot-number, cost and price sold for, of all his sales during the week. He is also to remit to M. Lyon, on each Monday, a check for the full amount of the week's sales, less the expenses and his half of the profits.

“The business is to be under the control of M. Lyon, and he is to be consulted in reference to advertising and all other matters connected with the business.

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"When the business is discontinued, the goods which are the property of M. Lyon are to be returned to him at Evansville.

"If R. Ferriman adds any other goods on his own account to the stock, he is to pay part of the expenses in proportion to the amount sold. R. Ferriman is to keep the clothing and furnishing goods, all goods furnished by M. Lyon, insured in the name of M. Lyon, for the full value of the goods; and goods owned by R. Ferriman or others in same store house, to be insured 'separately.'

"R. FERRIMAN.

"M. LYON."

On the same paper as the foregoing agreement is the following:

"SHAWNEETOWN, ILLINOIS, July 9th, 1886.

"We have carefully examined the contract between M. Lyon of Evansville, and R. Ferriman of Shawneetown, hereto attached, and give this my bond to guarantee to M. Lyon, that we will be responsible for the fulfilment of the aforesaid contract. In case R. Ferriman should fail to comply with this contract fully, we pledge ourselves to fulfil the contract in his stead. We guarantee to stand good to M. Lyon for any loss he may sustain in case R. Ferriman fails to comply with his contract.

"MARTHA H. FERRIMAN.

"MARSHALL M. POOL.

"JACOB BECHTOLD."

Appellee furnished the goods under the contract to Ferriman, and a store was opened by him at Shawneetown, and conducted under their said contract until about the 20th of April, 1887. By the direction of the appellee the business was then discontinued, and the goods returned to the appellee at Evansville. When received by the appellee, the goods were wet and damaged, and this action was brought against Ferriman and the appellant Bechtold on the written contracts above set out, to recover damages for injury to the

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goods by reason of being wet and injured, and for other alleged breaches of his contract by Ferriman. The action was subsequently dismissed as to Ferriman, and was prosecuted as an action against the appellant, as guarantor, for breach of the contract by Ferriman.

Issue was joined and the case tried by the court, and special findings of facts were made and conclusions of law stated in favor of appellee.

The finding of fact which fixes the liability of the appellant for damages to the goods in returning them to the appellee at Evansville is numbered eight, and is as follows :

" 8. Shortly before the 21st day of July, 1887, the plaintiff directed said Ferriman to discontinue the business at Shawneetown, and to ship the goods remaining in stock then to plaintiff at Evansville, Indiana. As the result of some correspondence between Ferriman and the plaintiff, it was understood that the goods should be shipped on a steamboat plying between Evansville, Indiana, and Cairo, Illinois, and passing the port of Shawneetown, and owned and run by the Evansville, Cairo and Memphis Steam Packet Company. On the 21st day of July, 1887, said Ferriman packed the goods aforesaid in eleven dry goods boxes or cases which he had procured from various merchants in Shawneetown, and which had been used before for the transportation of goods. They were the best that could be obtained at Shawneetown, at the time, but were not in such condition that they would prevent water from penetrating them and injuring their contents if exposed to rain. Said Ferriman delivered said goods to L. Roselot, who was engaged in the general business of handling and delivering goods and merchandise to and from steamboats, railroads and merchants in said city of Shawneetown, with wagons and drays, to be carried from Ferriman's store to be delivered to E. F. Harsha, at the steamboat landing in said city. The boxes containing the goods were delivered to said Roselot about the middle of the afternoon. After the goods left the store, said Ferriman never saw them again, or

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the boxes containing them, and gave no further attention to them. His place of business was about a square and a half from the river. He did not go to the river or make any inquiry as to where the goods were placed, or how they were disposed of. At that time there was no wharf boat at Shawneetown, and no protected place in use for the storage of goods to be shipped by steamboat, except a railroad freight car on a railroad track, and embankment on the river bank at the steamboat wharf, and these facts were known to said Ferriman when he sent said goods to the landing and wharf aforesaid. The boxes containing the goods were delivered by the said Roselot to one E. F. Harsha, at the wharf and place aforesaid, and were placed on the wharf or place of landing at the river without anything under them or over them except some old skiff sails or canvas, and remained in that condition until the next morning. The said E. F. Harsha was without visible property; it was rumored that he had property in Kansas. He was then and had been in the business for several months, at that place, of receiving goods from merchants at Shawneetown and shipping them at the landing and wharf aforesaid for merchants and persons doing business there, on steamboats. He was the only person engaged in that business at Shawneetown, at that time, and did receive and ship goods generally for the merchants and shippers of that place on steamboats at that time. He was not the agent of the Cairo and Memphis Steam Packet Company, and had no power or authority to issue bills of lading for said company, or to receive freight for such company, or to make any contracts whatever on behalf of said company. No bill of lading was ever issued to said Ferriman for said goods. Said E. F. Harsha, when the goods were placed on the river bank, gave to Roselot, and Roselot returned to said Ferriman, an instrument in the form of a bill of lading, which purports on its face to be a receipt issued from the steamer Sam C. Jones to said E. F. Harsha for the goods in question, but said instrument was not signed

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or executed by any officer or agent of said steamer, or of the Evansville, Memphis and Cairo Steam Packet Company, the corporation to which said steamboat belongs, and by which said steamer was at the time run and operated, but said instrument was signed only by said E. F. Harsha himself. Said instrument is as follows :

“ E. F. Harsha, Wharf-boat Proprietor and Forwarding and Commission Merchant. Received, Shawneetown, Ill., July 21st, 1887, in good order and condition, of E. F. Harsha, on board the good steamboat Sam C. Jones, the articles described below, to be delivered without unavoidable delay (the dangers of navigation, fire, explosion and collision excepted), on wharf-boat or landing at the port of Evansville, Indiana, where carrier's responsibility shall cease, with privilege of lighting, towing and reshipping unto M. Lyon or assigns, he or they paying freight for said goods at the rate of — and charges of \$1.00.

Marks.	Articles.	Weight.
	11 cases of clothing, etc.,	2,000.
	(Signed)	E. F. HARSHA.

E. car.

Charges.

Pd. 1st car.

Original.

Transfer.

Insurance.

Cooperage.

Forwarding.

Total.'

“ During the day on which the goods were so placed on the river bank the weather was fair, but the signal service indicated rain, and between 7 and 8 o'clock in the evening a violent rain storm came up, and it rained heavily for an hour or more, and continued raining more or less during the night. During all this time the boxes containing said clothing and goods were lying on the bank of the river, without

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any covering or protection except some old skiff canvas not sufficient to protect them; and by the rain aforesaid were made very wet, and such rain penetrated said boxes and caused said clothing and goods to become wet, discolored, and otherwise greatly damaged. The said Richard Ferriman was guilty of negligence in sending said goods to the river and permitting them to remain there all night in an unprotected situation and condition, and in the shipment of said goods, and by reason of such negligence said goods were damaged. The said E. F. Harsha had tarpaulin for the protection of these goods when he received the same, and could have protected them had he used them; that Harsha was guilty of negligence in permitting said goods to be exposed to the rain in the unprotected condition aforesaid.

"Early the next morning the steamer Sam P. Jones arrived at Shawneetown on her way up the Ohio river, bound for Evansville, and said goods were taken on said steamer, and by her brought to Evansville. The boxes were wet when taken on board the steamboat, and were placed near the boilers, and in a protected position. Said goods were delivered to the plaintiff at his place of business in Evansville, on the afternoon of the same day, and they did not receive any damage or injury, from rain or otherwise, from the time they were placed on board the steamer at Shawneetown until they were delivered to the plaintiff at his store at Evansville.

"By reason of the rain which fell on said boxes at Shawneetown, as before described, said goods were damaged and injured, and were delivered to the said plaintiff in a damaged condition. The fair and reasonable value of the goods in Evansville at the time they were delivered to the plaintiff, if they had been in good order and condition, would have been three thousand dollars. The fair and reasonable value of said goods in the damaged condition in which they were delivered to the plaintiff was fifteen hundred dollars, and the

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plaintiff has sustained damages by reason of said injury to said goods in the sum of fifteen hundred dollars."

Under the contract the goods remained the property of Lyon, and when the business was discontinued Ferriman was to return the goods to Lyon at Evansville. By the finding of facts it is found that, "as the result of some correspondence between Ferriman and Lyon, it was understood that the goods should be shipped on a steamboat plying between Evansville, Indiana, and Cairo, Illinois, and passing the port of Shawneetown, and owned and run by the Evansville, Cairo and Memphis Steam Packet Company." It is immaterial to determine whether Ferriman was to return the goods and deliver them to the appellee at Evansville, or whether he was released from that obligation by the correspondence, and by such correspondence obligated himself to ship the goods on a steamboat plying between Shawneetown and Evansville, operated by the steamboat company above named, for if he was only obliged to ship the goods on the boat, he was not discharged until he delivered the goods to the company plying the boat, and he was bound to take proper care of the goods until so delivered, and was liable for any injury occurring to the goods by reason of his neglect, at least, until they were delivered to the company plying the boat on which they were to be shipped. The finding of facts show that through his neglect, or the neglect of his agent, entrusted to deliver the goods to the boat company, the goods were injured prior to the delivery of the same to the company operating the boat. The finding of facts show that neither Roselot, the drayman, nor Harsha, to whom he delivered the goods at the wharf, were the agents of the Evansville, Cairo and Memphis Steam Packet Company, the owners and operators of the boat on which the goods were to be shipped.

Ferriman was bound to take good care of the goods, and was liable for any injury occurring to the goods through his carelessness, or the carelessness of his agents while they were under his control, at least in transporting them to the boat,

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and prior to their delivery to the company plying the boat on which they were to be shipped, even if he was exonerated by the correspondence from delivering them in good condition to the appellee at Evansville. Both Roselot and Harsha were acting for Ferriman in transporting and delivering the goods to the boat company plying the boat on which the goods were to be shipped. Instead of delivering the goods on the boat himself, Ferriman entrusted them to do so, and he was liable for their negligence. *Taylor v. Cole*, 111 Mass. 363; Benjamin Sales, section 695.

It is further contended by counsel for the appellant that, to hold the appellant, notice must have been given to him by the appellee of his acceptance of the contract of guaranty, and that no such notice was given. We can not agree with this theory of counsel. The contract of guaranty was executed on the same paper as the contract between Lyon and Ferriman, and is an absolute contract of guaranty or promise to pay upon the failure of the principal to do so, and must be regarded, we think, as being executed contemporaneously with the other contract, or that it was executed subsequent to the other contract, and was a guaranty of the fulfilment of an existing contract, and in either case no notice of acceptance is necessary. This is the settled law of this State. *The Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, and authorities cited; *Snyder v. Click*, 112 Ind. 293; *Wills v. Ross*, 77 Ind. 1; *Nading v. McGregor*, 121 Ind. 465.

The rule is different where it is a mere proposition to become responsible in case credit is extended, or a contract is thereafter to be entered into on the faith of the guaranty.

This disposes of all the questions presented and discussed.

There is no error in the record.

Judgment affirmed, with costs.

Filed Jan. 15, 1892.

Blaker v. The State.

No. 16,366.

BLAKER v. THE STATE.

CRIMINAL LAW.—Information, Quashing of.—The fact that an information does not allege that the court was in session when it was filed, and does not refer to the affidavit filed as the source of the prosecutor's information, is no ground for quashing the information under section 1759, R. S. 1881.

SAME.—Right of Jury to Determine the Law.—Instruction.—In a prosecution for larceny of a horse, an instruction that "You * * * are the judges of the law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves. Notwithstanding you have the legal right to disagree with the court as to what the law is, still you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason,"—is a correct statement of the law.

SAME.—Possession of Stolen Horse.—Instructions.—In such prosecution it is error to instruct that if defendant at one time had the horse in his possession, and afterward abandoned or left it, and does not account for or explain how he honestly came into possession of it, such facts, if proven beyond a reasonable doubt, raise the presumption that the defendant stole the horse; and that, in such case, if defendant does not in some reasonable way explain his possession to the satisfaction of the jury, the presumption of guilt becomes conclusive.

From the Greene Circuit Court.

W. W. Moffett and C. E. Davis, for appellant.

W. C. Hultz, for the State.

MCBRIDE, J.—The appellant was charged with the larceny of a horse. He was prosecuted on information and convicted. Two errors are assigned:

1st. That the court erred in overruling a motion to quash the information.

2d. That the court erred in overruling a motion for a new trial.

The court did not err in overruling the motion to quash. The only ground upon which the appellant argues that this motion should have been sustained is, that the information

130	203
147	221
130	203
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150	76
130	203
153	566
130	203
1171	82

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contains no statement that court was in session when it was filed, and does not refer to the affidavit filed as the source of the prosecutor's information. We find it unnecessary to pass upon either question thus suggested. Even if it were admitted that the information was defective by reason of the omission of these averments, or either of them, the question does not arise on a motion to quash.

Section 1759, R. S. 1881, prescribes the grounds upon which a motion to quash an indictment or an information may be based, and the objections urged to the information before us do not fall within its terms.

The first and second reasons upon which a new trial was asked are: 1st. That the verdict was contrary to law, and 2d. That the verdict was not sustained by sufficient evidence. Of these we will only say that in view of the uniform practice of this court, if no other reason for a new trial was assigned, we would not reverse the judgment.

The third and fourth reasons for a new trial are based on alleged errors in instructions given. The instructions given were thirty-two in number. The appellant insists that all except eleven, which were given on his motion, were erroneous. We will only notice three of them—No. 4, given by the court on its own motion, and Nos. 25 and 26, given on motion of the prosecuting attorney. No. 4 is as follows:

"You, gentlemen, in this case, are the judges of the law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves. Notwithstanding you have the legal right to disagree with the court as to what the law is, still you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason."

This instruction is fully sustained by *Anderson v. State*, 104 Ind. 467, and is correct on principle.

The Constitution gives to juries in criminal cases the

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right to *determine* the law as well as the facts. It does not, however, give to them the right to *disregard* the law. To aid them in correctly determining the law, it is made the duty of the court to instruct them. They have no more right in determining the law to disregard and ignore the court's instructions arbitrarily and without cause than to disregard and ignore the evidence, and determine the facts arbitrarily and without cause.

The twenty-fifth and twenty-sixth instructions are as follows:

"No. 25. If the defendant at one time had the stolen property or mare in his possession in this case, and afterward abandoned or left such mare, and does not account for or explain how he honestly came into possession of her, such facts, if they be proven beyond a reasonable doubt in this case, raise the presumption that the defendant stole said mare.

"No. 26. If you find in this case, beyond a reasonable doubt, that the defendant at one time had the stolen property or mare in his possession in this case, and left or abandoned her, and does not in some reasonable way explain to your satisfaction the possession of said mare, the presumption of guilt becomes conclusive."

The exclusive possession of stolen property soon after the larceny, if unexplained, raises a presumption that the person in whose possession it is found is guilty of the larceny. Gillett Crim. Law, section 553; *Smathers v. State*, 46 Ind. 447; *Galvin v. State*, 93 Ind. 550; *Turbeville v. State*, 42 Ind. 490; *Hall v. State*, 8 Ind. 439; *Engleman v. State*, 2 Ind. 91; *Jones v. State*, 49 Ind. 549.

The presumption thus raised is a presumption, or rather an inference, of fact, and not a legal presumption. *Smith v. State*, 58 Ind. 340.

That is, the courts can not say, because of such possession and want of explanation, that as a question of law the accused must be deemed guilty, but the jury are authorized to

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consider such evidence as tending to show guilt, and, the larceny being shown, the circumstances connected with such possession and want of explanation may be sufficient to make the question of guilt, as a question of fact, conclusive and sufficient in and of themselves to justify conviction.

The length of time that must elapse after the larceny of goods before their possession should cease to be considered as tending, with other facts, to show guilt, is, as a rule, purely a question of fact for the jury. Naturally, the shorter the time the stronger the inference, but the weight of such inference must be determined by the jury.

The presumption of guilt does not arise from the mere possession of the property, but from such possession *after* it has been stolen, coupled with the absence of explanation, or of any thing tending to show that such possession is or may be consistent with honesty. Waiving any question of mere verbal criticism or inaccuracy in the two instructions, they are not correct statements of the law.

They both assume that the mare was in fact stolen. This was error. *Jackman v. State*, 71 Ind. 149; *Smathers v. State*, *supra*; *Barker v. State*, 48 Ind. 163; *Killian v. Eigenmann*, 57 Ind. 480.

In terms, they would both apply equally to a possession of the mare, before or after the time of the alleged larceny; nor do they make any note of the nearness of the possession to or its remoteness from the time of the alleged larceny; so that the jury are informed that an unexplained possession of stolen property, which may have been long removed in point of time from the larceny, not only *may*, but *does*, raise the presumption that the accused stole it. Of the assumption that the mare was stolen, it is said that on the trial the fact that she was stolen was not controverted. That fact was controverted by the plea of not guilty. A defendant may, undoubtedly, by a formal admission, or by the adoption of a given line of defence, justify the court in assuming the existence of material facts put in issue by that plea. Thus, a

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defendant charged with homicide, who defends alone on the ground of self-defence or of insanity, may thus justify the court in assuming in instructions to the jury that he did the act charged.

Here, however, the record shows no admission, and discloses no other facts justifying the assumption. The defence of an *alibi*, urged by the accused, did not necessarily involve any admission that the mare was stolen.

The twenty-sixth instruction is especially objectionable. It imposes upon the accused the necessity of explaining his possession of the mare *to the satisfaction of the jury*—failing in which the jury is told the presumption of his guilt becomes conclusive. This is plainly erroneous. Assuming that the jury find the mare was, in fact, stolen; that soon thereafter she is found in the possession of the accused; and that he attempts to explain, or account, for such possession, but his explanation is not satisfactory, yet is sufficient to create in the minds of the jury a reasonable doubt,—in such case he should be acquitted. His explanation may be very unsatisfactory, and fall far short of convincing the jury; yet if, after hearing and weighing it, they entertain a reasonable doubt of his guilt, they should acquit.

We are supported in the conclusions above stated by the following additional authorities, with many others: *Bailey v. State*, 52 Ind. 462; *Howard v. State*, 50 Ind. 190; *Clackner v. State*, 33 Ind. 412; *Way v. State*, 35 Ind. 409.

The fifth reason assigned for a new trial was a ruling of the court on evidence offered by the appellant. We consider it unnecessary to further notice this question, or the questions presented on the other instructions given, than to say that, except in the giving of instructions numbered twenty-five and twenty-six, we find no error in the record.

Because of the error in the two instructions referred to the judgment is reversed, and the circuit court is directed to grant the appellant a new trial.

Filed Jan. 26, 1892.

The State v. Runyan.

No. 16,078.

THE STATE v. RUNYAN.

PERJURY.—*Claim for Sheep Killed by Dogs.—False Affidavit.—Under What Statute Claimant Must be Prosecuted.*—A claimant for compensation for the value of sheep killed by dogs, who makes a false and corrupt affidavit to his claim, can not be prosecuted for perjury under the general statute (section 2006, R. S. 1881) defining that crime, but must be prosecuted under the statute (Elliott's Supp., section 450) providing for the presentation and payment of such claims, and defining the offence of one who falsely swears to such a claim.

From the Adams Circuit Court.

A. G. Smith, Attorney General, G. T. Whitaker, Prosecuting Attorney, and J. T. France, for the State.

ELLIOTT, C. J.—As we understand the argument of counsel representing the State, they place their asserted right to a reversal of the judgment of the trial court quashing the information upon the sole ground that the information well charges the crime of perjury under the statute defining that crime. Section 2006, R. S. 1881. We also understand from their argument that the court below quashed the information upon the ground that a prosecution against one who makes a false and corrupt affidavit to a claim presented to a township trustee for sheep killed by dogs must be conducted under the statute providing for the presentation and payment of such claims, and defining the offence of one who falsely swears to such a claim. We further understand counsel to concede that, if the only statute under which the appellee can be prosecuted is the statute last named, and not the statute defining the crime of perjury, the information is insufficient. We have thus stated the position of counsel in order that it may be clearly seen that the question—and the only question—we are required to decide is this: Can a claimant for compensation for the value of sheep killed by dogs, who makes a false and corrupt affidavit to his claim,

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be prosecuted for perjury under the general statute, or must he be prosecuted under the particular statute which governs the subject of claims against the township trustee in such cases?

The township trustee is not a judicial officer, and he can not sit as a court or exercise the functions of a court. *State, ex rel., v. Noble*, 118 Ind. 350; *Shugart v. Miles*, 125 Ind. 445; *Smythe v. Boswell*, 117 Ind. 365, and cases cited; *Shoultz v. McPheeters*, 79 Ind. 373, and cases cited; *Wilkins v. State*, 113 Ind. 514; *Kuntz v. Sumption*, 117 Ind. 1, and cases cited.

There was, therefore, no evidence given in a court. There was simply and solely an affidavit made to a claim presented to the township trustee under the statute. That statute reads thus: "The owners of sheep killed or maimed by dogs shall, within ten days from the time thereof, report to the trustee of his township, under oath, in which he shall state the number, age (as he believes) and the value of the sheep so killed, and the damages sustained on account of the maimed; and any person who shall make any false statement of any such matters shall, upon conviction, be fined in any sum not exceeding one hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding thirty days." Elliott's Supp., section 450. It seems quite clear to us that this statute fully defines the offence of one who makes and presents to the township trustee a false affidavit, and that the person who perpetrates such a wrong must be prosecuted under the particular statute. It professes to cover the subject of claims against the township trustee for sheep killed by dogs, and to provide for the punishment of one who falsely swears to a claim. It accomplishes what it professes, and, hence, excludes other statutory definitions of a general nature.

We have given careful study to counsel's argument, which has for its basis the familiar doctrine that repeals by impli-

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cation are not favored, but we are unable to perceive its relevancy to the point here in dispute, insomuch as there is here no question as to whether a statute has been repealed, for the question is, what statute applies to a particular class of cases?

It is competent for the Legislature to declare that one who makes a false affidavit to claims of a general class shall be guilty of a designated offence, and to prescribe the punishment for making such corrupt affidavits, and this it has done. As the Legislature has clearly and explicitly defined the specific offence, the guilty person must be prosecuted under the statute which defines the offence and prescribes the penalty.

Judgment affirmed.

Filed Jan. 12, 1892.

130	210
131	114
131	404
131	423
132	31

No. 14,800.

LINVILLE ET AL. v. THE STATE, EX REL. BOARD OF COMMISSIONERS OF DELAWARE COUNTY.

COUNTY COMMISSIONERS.—*Construction of Free Gravel Road.*—*Action on Contractors' Bond.*—*Settlement with Board.*—*Effect.*—Where a board of commissioners lets a contract for the construction of a free gravel road, selects a competent engineer to see that the work is performed according to such contract, and, after determining that the work is completed according to the contract, accepts the same, and settles with the contractors, the settlement is conclusive, and no action can be maintained upon the contractors' bond for an alleged breach thereof so long as the settlement with the contractors remains in force and unimpeached.

From the Delaware Circuit Court.

W. W. Orr, for appellants.

J. W. Ryan, for appellee.

COFFEY, J.—The facts in this case, so far as they are necessary to an understanding of the vital question presented

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for our decision, are that at the December term, 1883, of the board of commissioners of Delaware county a petition was filed praying for the improvement of a public highway, making it a free gravel road under the provisions of our statute upon that subject. Such proceedings were had, under the petition, that the contract for the improvement asked was let to the appellants, Linville and Linville. For the performance of the work according to the terms of the contract, Linville and Linville executed a bond with the other appellants herein as their sureties. The contractors entered upon the work under the personal supervision of a superintendent, who was the county surveyor and a competent engineer, and proceeded with it until such time as they claimed it was completed according to the terms of the contract. As the work progressed the superintendent made partial estimates, which were allowed and paid. When the work had been completed, as claimed by the contractors, they so notified the board of commissioners and superintendent and engineer, when it was inspected and accepted. The engineer made a final estimate, filed it with the board of commissioners of Delaware county, who allowed it, and the contractors were paid in full according to the terms of their contract.

This action was brought by the State on the relation of the board of commissioners of Delaware county, on the bond of the contractors, to recover damages for an alleged breach of the bond in failing to perform and complete the work according to the terms of the contract. No allegation is found in the complaint to the effect that there was any fraud, mistake or other illegality in the settlement between the contractors and the board of commissioners of Delaware county.

Objections are made to the rulings of the circuit court on demurrers to the several pleadings in the cause, but, as we have reached the conclusion that this action can not be maintained under the issues as they are formed, we need not encumber this opinion by a consideration of these objections.

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The law favors the settlement of business transactions by the parties, and when they make such settlements they will be held bound thereby in the absence of fraud or mistake or other illegality. A voluntary settlement of accounts between parties affords a presumption that all items properly chargeable at the time were included. This presumption is not conclusive, but clear and convincing proof that such items were unintentionally omitted is necessary to sustain a subsequent claim to recover them. American and English Encyclopædia of Law, Title "Account;" *Bull v. Harris*, 31 Ill. 487; *Lee v. Reed*, 4 Dana (Ky.), 109; *Kennedy v. Williamson*, 5 Jones L. (N. C.) 284; *Stebbins v. Niles*, 25 Miss. 267; *Leighton v. Grant*, 20 Minn. 345; *Rowell v. Marcy*, 47 Vt. 627; *Lockwood v. Thorne*, 18 N. Y. 285; *McNeel v. Baker*, 6 W. Va. 153.

A settlement of accounts will, generally, be deemed conclusive between the parties, unless some fraud, mistake, omission or inaccuracy is shown. *Ruffner v. Hewitt*, 7 W. Va. 585; *Farmer v. Barnes*, 3 Jones Eq. (N. C.) 109; *Bourke v. James*, 4 Mich. 336; *Mills v. Geron*, 22 Ala. 669.

Such settlement will not be opened for a clerical error which does not affect the result, nor where the party complaining was aware of the facts at the time he made the settlement. *Wilson v. Frisbie*, 57 Ga. 269; *Quinlan v. Keiser*, 66 Mo. 603.

In cases of the class to which this belongs the board of commissioners is, in a sense, the agents of those whose lands are assessed for the improvement, for the purpose of letting the work, and they are charged with the duty of selecting a competent engineer and superintendent to see that the work is performed according to the contract, and to receive and pay for the same out of the funds in its hands for that purpose.

In this case the board of commissioners performed that duty, and, after determining that the work was done according to the contract, it settled with and paid the contractors. It is

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not claimed that there was any fraud or mistake, either in the acceptance of the work or in the settlement, and, if the board had power to make such settlement, it is binding, according to the authorities above cited, on all the parties.

It is contended, however, that the board of commissioners had no power to dispense with the performance of any part of the contract, and, as a result, it could not accept the work as completed, unless it was in fact performed according to the terms of the contract.

We do not think the case involves the question of the power of the board of commissioners to dispense with performance of any part of the contract, but the question is whether they had power to determine whether the contractors had in fact performed the contract. Certainly it was not the intention of the Legislature to leave that question to the persons whose lands are to be assessed, as they are generally very numerous, and the inconvenience of having them each inspect the work would be very great. We do not think the law contemplates that those assessed shall perform any such duty; but we are of the opinion that the board of commissioners, which represents them, shall perform the duty, and when it determines that the work is completed, it is its further duty to settle with and pay the contractor. If it does not possess such power, then the surety on the bond can never know when his obligation is at an end. If he had taken collateral security as an indemnity, he would not be safe in surrendering it until the statute of limitations had barred a right of action on his bond. We do not think the Legislature intended to leave the matter of constructing free gravel roads in this loose and unsatisfactory condition; but, on the contrary, that it intended to confer on the board of commissioners the power to accept and settle for such highways, when, in its judgment, the contract had been performed.

The funds arising from the sale of bonds are under the control of the board of commissioners for the purposes named in the statute, and the power to settle with the contractor and

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pay out the funds is, we think, clearly to be inferred from the terms of the act providing for the building of free gravel roads.

Having reached this conclusion, it follows that no action can be maintained upon the bond so long as the settlement with the contractors remains in force and unimpeached.

Judgment reversed, with directions to grant a new trial.

Filed Jan. 28, 1892.

No. 15,326.

**THE UNION CENTRAL LIFE INSURANCE COMPANY v.
SCHIDLER.**

JUDGMENT.—*Fraud.—Joint Tort-Feasors, Recovery Against One on Fraudulent Contract, Effect on Prosecution Against the Other.*—Where two persons have conspired to enable one of them to procure a loan upon a worthless security, the recovery of a judgment on contract against the one so procuring the loan is no bar to an action against the other for damages sustained by reason of his participation in the fraud.

SAME.—*When Cause of Action Arises.*—As soon as the fraud is committed, in such an instance, a cause of action arises.

From the Steuben Circuit Court.

J. A. Woodhull, W. M. Brown and F. S. Roby, for appellant.

J. I. Best, D. R. Best and E. A. Bratton, for appellee.

MILLER, J.—The assignment of errors calls in question the ruling of the court in overruling the demurrers to the second paragraph of the answer to the amended first paragraph of complaint, and to the amended third paragraph of answer to the second paragraph of complaint.

The causes of action stated in each paragraph of complaint are substantially alike, and state, in substance, that Admiral J. Schidler, the son of the appellee, fraudulently ob-

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tained from the appellant a loan of \$1,750 by misrepresenting the location, quality, condition and value of a tract of land upon which a mortgage was executed to secure a note for the loaned money; that the appellee conveyed the land to his son in order to enable him to obtain the loan, and conspired and confederated with him to procure from the appellant a loan of money and not to repay it, and that after the loan was made the appellee received and used the major portion of the money; that, the note not having been paid, the mortgage was foreclosed, and the land sold for the sum of \$500, its full value, and an execution for the residue of the judgment was returned *nulla bona*.

The character of the representations, and of the participation of the appellee in the fraud, is such that no question can arise as to their materiality.

The second paragraph of the answer to the amended first paragraph of complaint avers, in substance, that, after default had been made in the payment of the loaned money, the appellant brought an action against the son, and recovered a judgment for the full amount of the damages that it had sustained by reason of the loaning of the money, and that the said damages are the identical damages sought to be recovered in the paragraph of complaint to which this paragraph is directed, and denies the averments of fraud alleged against the appellee.

The third paragraph of answer to the second paragraph of complaint avers that the appellant, after default in payment of the note, brought an action against the son upon the note, and recovered a judgment against him for the full amount of its damages, and caused an execution to issue thereon against him.

The appellee contends that if it be conceded that he was liable for the money fraudulently obtained by his son, the facts which created such liability constituted a single cause of action, for the enforcement of which the appellant had several remedies; that it had the right to repudiate the

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transaction and recover back its money as upon a rescission of the contract; or it had the right to affirm the contract, and bring an action in tort against the father and son jointly, or against either severally; or, upon failure of the son to pay the debt, to bring an action against him upon his contract; that, the appellant having affirmed his contract, its remedy was either to recover its damages in an action upon the contract or in tort; but that it could not do both.

We are unable to agree with the appellee in this contention. We know of no rule of law that would prevent the application, to this transaction, of the ordinary rule that a defrauded party may affirm the contract by retaining that which he has received and suing for the damages he has sustained by reason of the fraud. If the appellant had the right to retain the note and mortgage, the right to collect them by suit or otherwise is implied as an ordinary and necessary incident to such ownership.

It follows that an action on the contract and one predicated on the fraud are not inconsistent, and that both may be prosecuted concurrently, and recovery in the one will not bar a recovery in the other.

When the fraud charged in the complaint was perpetrated, and the *tort-feasors* had thereby procured the loan, a cause of action was immediately created in favor of the defrauded party, and they were entitled to a recovery on account of the wrong for some amount, the damages being unliquidated and dependent upon the extent of the injury. Afterward, when default was made in the payment of the note, a cause of action was created in favor of the holder of the note, for a recovery against the maker, for damages for its non-payment, the amount of the recovery being fixed by the terms of the contract. These two causes of action neither accrued at the same time nor were predicated upon the same defalcation or wrong.

In the case of *Wanzer v. De Baun*, 1 E. D. Smith, 261, the plaintiff had recovered a judgment against the defendant

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as endorser of a promissory note, given in payment for goods sold by the plaintiff to a third person. Afterwards an order of arrest was granted on account of fraudulent and deceitful misrepresentations made by the defendant at the time the goods were sold. In the opinion of the court it is said: "Recovery of judgment on the contract is no bar to an action for the deceit practiced to induce the plaintiffs to make it. Were the plaintiffs now seeking to recover the *specific goods* in repudiation of the *title* of the vendee, it might be a good answer that they had affirmed the sale by suing upon the note given for the goods. But here is no repudiation of the sale. The sale was effectual. The plaintiffs lost their property thereby. They were induced, by the defendant's fraud, to make the sale, and he is justly liable for the damages which they have sustained." And at another place, speaking of the defendant, the court says: "I do not think he can be permitted to say, 'True, I defrauded the plaintiffs, but they have recovered a judgment against me, and purged my fraud, by proving, through the return of their execution unsatisfied, the very cheat by which I deceived them.'"

In *Morgan v. Skidmore*, 55 Barb. 263, it was held that an action of tort could be maintained against a person, or his personal representative, for deceit in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment had been recovered against the firm for the price of the goods sold on credit to the firm in consequence of such misrepresentation. This case was affirmed on appeal by the Court of Appeals, the case of *Wanzer v. De Baun*, *supra*, being cited and approved. *Morgan v. Skidmore*, 3 Abb. N. C. 92.

These cases have been cited and followed in *Goldberg v. Dougherty*, 39 N. Y. Sup. Ct. 190; *Johnson v. Luxton*, 41 N. Y. Sup. Ct. 481; *Bowen v. Mandeville*, 95 N. Y. 237.

In *Whittier v. Collins*, 15 R. I. 90, the court arrived at the same conclusion, citing and following *Wanzer v. De Baun*, *supra*.

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We do not regard the case of *Caylus v. New York, etc., R. R. Co.*, 49 How. Pr. 100, as being in conflict with these cases. In that case the judgment for fraud, if rendered, would have been against the same party, and it was held that the judgment which had been entered gave as full and complete a remedy as the judgment for damages on account of the fraud would afford.

We are not of the opinion that the statement in the pleading that an execution had been issued on the judgment against the son added any thing to the sufficiency of the defence therein interposed. The judgment taken against the son of the appellee was upon contract, and not in tort, and we know of no authorities holding that the mere issuing of an execution in such action works a satisfaction of the judgment. Authorities as to the effect of executions issued upon judgments founded in actions for torts are not in point.

It is contended with much force and earnestness that the appellant can not retain the personal judgment which he has obtained, and then take judgment against the appellee for the amount of the money loaned, less the value of the land, for the reason that this would give two judgments for the same thing. The fallacy of this argument is the assumption that both judgments would be for the same thing, which the cases above cited hold is not the case; and for the additional reason that the appellee is not the person against whom the judgment has been taken.

The effect of payment of one of two judgments rendered, respectively, on contract and for tort, is not now before us, and we do not pass upon the question. But see *Bowen v. Mandeville, supra*.

The appellee also insists that each paragraph of the complaint was bad on demurrer, and therefore that the answers were good enough for a bad complaint. The objection urged to each of the paragraphs of complaint is their failure to state the value of the mortgaged land at the time the mortgage was executed, and the misrepresentations made. We

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find that the land upon which the mortgage was executed is said to have been of little value, and other averments are contained in each paragraph of like import. In the absence of a motion to make the complaint more specific, each of the paragraphs was sufficient.

The defects in the paragraphs of complaint could only affect the amount of damages to be assessed upon a recovery, and not the right to recover some amount. *Korradý v. Lake Shore, etc., R. W. Co.*, 131 Ind. —.

In our opinion the court erred in overruling the demurrers to the second paragraph of answer to the amended first paragraph of complaint, and the amended third paragraph of answer to the second paragraph of complaint, and therefore the judgment is reversed.

McBRIDE, J., took no part in the decision of this case.

Filed Jan. 16, 1892.

No. 15,232.

RASSIER v. GRIMMER, TRUSTEE, ET AL.

HIGHWAY.—*Collateral Attack on Order Establishing.*—A collateral attack on an order of a board of county commissioners establishing a highway can only succeed when such order is void; and if it is simply irregular or erroneous, the remedy is by appeal to the circuit court.

SAME.—*Jurisdiction of Board of County Commissioners.*—The board of county commissioners has jurisdiction of all highways of its county outside of incorporated towns and cities.

SAME.—*Establishment of.—Compensation to Land-Owner.*—While under the Constitution no one's land can be taken for the establishment of a highway without compensation, such compensation need not be made in money. Benefits accruing to the land from the establishment of the highway may constitute full and just compensation within the meaning of the constitution.

COUNTY COMMISSIONERS.—*Presumption as to Regularity of Judgment.—Collateral Attack.—Courts of Limited Jurisdiction.*—A board of county commissioners is a court of limited jurisdiction, and the same presumption of regularity does not attach to it as does to courts of general jurisdiction; but when it affirmatively appears that it has acquired jurisdiction both of the subject-matter and of the parties, and the judgment is such as it might rightfully render in such a case, the same presumption of regularity attaches to its proceedings as to

130	219
130	106
130	219
134	264
130	219
162	405

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the proceedings of a court of general jurisdiction, and its judgments are alike unassailable by collateral attack.

From the Lake Circuit Court.

T. J. Wood and M. Wood, for appellant.

T. S. Fancher, for appellees.

MCBRIDE, J.—By this suit the appellant sought to enjoin the appellees, who are respectively township trustee and road supervisor, from opening a certain highway which had previously been ordered established by the board of commissioners of Lake county. The appellant insists that the order for the establishment of the highway is void. We quote from the complaint the averments of fact relating to the alleged invalidity of the order: "The plaintiff further avers that the board of county commissioners of Lake county, Indiana, appointed viewers to appraise the damage that the opening of a certain road would cause to plaintiff's said land, and they made their report to said board in these words, to wit: 'To Michael Rassier no damages.' That said board at their ——— term, 1888, approved said report in these words, to wit: 'That said report is approved, and the road ordered opened. Road to be 60 feet wide, according to said petition.' Said order of said court may be found on the commissioners' record No. 5, on page 475."

The appellant contends that the order for the establishment of the road is void for several reasons, and that he is, therefore, entitled to enjoin the officers from opening it.

The attack on the order of the board of commissioners is collateral, and can only succeed if the order is void. If it is simply irregular or erroneous, the remedy was by appeal from the board of commissioners to the circuit court.

The board of commissioners had jurisdiction of the subject-matter. The subject-matter was the establishment of a highway in that county; and of all such matters outside of the limits of incorporated cities and towns the boards of

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county commissioners have original and exclusive jurisdiction.

It is averred in the complaint that the board appointed viewers to appraise the damages that would accrue to the appellant's land by the opening of the proposed highway, who acted and made a report to the board. No viewers could be appointed for such a purpose until after the filing of a remonstrance by the appellant claiming damages.

Construing the pleading, as we must, most strongly against the pleader, and the complaint being silent as to such matters, it will be presumed that the usual procedure was followed, and that the viewers to assess damages were only appointed after appellant had appeared and filed his remonstrance. If so, the board also had jurisdiction of his person. It being thus shown by the complaint that the order establishing the highway was made by a court having jurisdiction both of the subject-matter and of the person of the party, and that it was such an order as they might rightfully make in a proper case, every presumption favors its regularity. It is incumbent on the party attacking it to show affirmatively that it is void.

In this case there is nothing before us to show that the order in question was void. The complaint does not purport to set out the record of the commissioners' court. It only sets out so much of the report of the viewers as relates to the damages claimed by the appellant and one isolated order made by the board.

While the commissioners' court is a court of limited jurisdiction, and the same presumption of regularity does not attach to the proceedings of such courts as to the proceedings of courts of general jurisdiction, yet, when it affirmatively appears that a court of limited jurisdiction has, in a given case, acquired jurisdiction both of the subject-matter and of the parties to the litigation, and that the judgment rendered is such as it might rightfully render in such a case, the same presumption of regularity attaches to its proceedings as to

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the proceedings of a court of general jurisdiction, and its judgments are alike unassailable by collateral attack. *Stoddard v. Johnson*, 75 Ind. 20; *Argo v. Barthand*, 80 Ind. 63; *Featherston v. Small*, 77 Ind. 143; *Stipp v. Claman*, 123 Ind. 532 (537).

The circuit court sustained a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and in this it did not err. No facts were pleaded sufficient to justify a collateral attack on the order of the board, or to entitle the appellant to relief by injunction. No other error is assigned.

Judgment affirmed.

Filed Oct. 30, 1891.

ON PETITION FOR REHEARING.

MCBRIDE, J.—The appellant has filed an exceedingly earnest petition and brief for a rehearing.

Counsel insist that the court has overlooked one fact which renders the order of the board of commissioners establishing the highway in question void, and hence open to collateral attack.

It is argued that the record affirmatively shows a taking of the appellant's property without compensation. If the fact assumed does affirmatively appear from the record, appellant is right in his contention. Section 21, of article 1, of the Constitution of the State, declares that "No man's property shall be taken by law without just compensation." If the record of the board of commissioners, relating to the highway in question, affirmatively shows that the appellant's land has been taken for the making of such highway, without compensation to him, the order purporting to establish it is not merely voidable, but is void. But is such fact shown by the record? Appellant claims that it rests upon the report made by the viewers, of "no damage" to him. The substance of his contention is that the record showing the actual taking of his land for the highway, the

Rassier v. Grimmer, Trustee, et al.

inference of damage necessarily and conclusively follows, and that in the face of this inference the statement that he sustains no damage is without force; that it is conclusively overthrown by the fact that his land is actually taken. Subjecting one's land to the easement of a highway is a taking, within the meaning of the constitutional inhibition, and land can not be thus appropriated without compensation.

This, however, does not necessarily require that compensation be made in money. This court, in considering this question, in the case of *McIntire v. State*, 5 Blackf. 384, used the following language: "From this review of the statutes bearing on the question before us, and embracing the very time of the adoption of the Constitution, we can not doubt that its authors, in providing that 'just compensation' should be made for private property taken for public use, designed to convey the meaning which had been attached to that phrase by the community for more than seventeen years, and which has since remained unquestioned for a longer period of time. That meaning is, not that property thus taken shall be valued and its price paid in money, but that the individual who claims to be a sufferer, in consequence of the exercise of the right of eminent domain over his property, shall be recompensed for the actual injury which he may have sustained, all circumstances considered, by the measure of which he complains. In ascertaining the extent of the injury, undoubtedly, an estimation of the value of the property taken, at the time of taking, is a necessary step; but if the benefits really and substantially resulting to the claimant equal, in pecuniary value, the value of that of which the public has deprived him, we conceive they constitute a just and constitutional compensation for the deprivation to which he has been subjected."

The foregoing language was quoted and approved in *Hagaman v. Moore*, 84 Ind. 496.

In the case at bar, as stated in the original opinion, it being shown in the averments of the complaint that the board of commissioners had jurisdiction, both of the subject-matter

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and the parties, the same presumptions of regularity attach to their proceedings as would attach to the proceedings of a court of general jurisdiction. Unless plainly shown by the record, it will not be presumed that they have taken the property of the appellant in violation of his constitutional right. Such fact will not be presumed, because the report of the reviewers declares that he sustains no damage. On the contrary, the court, being required to indulge every presumption in support of the action of the board, must presume that, having considered the fact of the taking of appellant's land, in connection with all other facts relating thereto, the reviewers and the board reached the conclusion that benefits enuring to the land by reason of the location of the highway equalled the damage caused by the easement imposed, and hence there was "no damage." This being true, the record discloses no fact which would render the proceeding void; nor is any such fact averred in the complaint. The appellant had a full and adequate remedy by appeal, but can not successfully collaterally attack the order establishing the road.

Petition for rehearing overruled.

Filed Jan. 28, 1892.

130	224
132	566
130	224
1153	244

No. 16,031.

**THE LAKE ERIE AND WESTERN RAILROAD COMPANY
v. THE CITY OF KOKOMO.**

CITY.—Street.—Laying Out Across a Railroad Track.—A city in this State has power to lay out a street across a railroad's right of way.

Costs.—Appeal from Assessment of Damages.—On an appeal from a street assessment allowing damages, but assessing an equal amount of benefits, a land-owner appealed to the circuit court, and on trial the damages and benefits were both increased in an equal amount.

Held, that the appellant was not entitled to his costs in the circuit court.

From the Howard Circuit Court.

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J. O'Brien, W. E. Hackedorn and F. S. Foote, for appellant.

C. C. Shirley, J. C. Blackledge and B. C. Moon, for appellee.

OLDS, J.—This is a proceeding to locate a street in the city of Kokomo across the right of way of the appellant, the Lake Erie and Western Railroad Company, and to condemn the right of way for such purpose. The street crosses the railroad at right angles.

It is admitted by the appellant that the proceedings of the council and commissioners were regular, except it is contended that no tender of the amount of damages was ever made.

After making a suggestion in regard to the assessment of damages, counsel for appellant say: "The proposition more particularly sought to be raised in this case is as to the power or right of the city of Kokomo to condemn property already in public use, the same to be taken and used for other public uses, whether the same are consistent or inconsistent."

In Elliott Roads and Streets, p. 169, it is said: "A right to cross an existing public way with a street or road may often be implied, where a right to longitudinally take the way would not be deemed to exist. Where authority is granted to construct a road or street from one point to another, there is impliedly conferred a right to cross canals, railroads, turnpikes, streets or roads lying between the two points. A grant of authority, expressed in general terms, to seize lands and property for the purposes of a road or street will, in most cases, confer authority to construct the roads or streets across existing public ways, whether owned by public, or by private corporations, but it will not confer authority to lay the road or street longitudinally upon the existing way."

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This, we think, states the true doctrine, and the authorities are collected and cited in support of the text.

The statute makes full provision for the laying out of streets in cities, and authorizes the laying of the same out and opening them up across the right of way of a railroad company.

As regards the objection to the proceedings on account of no tender of the damages assessed by the city commissioners having been made :

The commissioners assessed \$25 damages, also assessed \$25 benefit to the land of the appellant. Instead of relying upon the fact that no tender of the damages had been made, and resorting to proceedings to prevent the city from opening up the street across the right of way of the appellant, the appellant appeals from the decision of the commissioners, and raises no question in regard to the tender, and no question is presented to this court relating to the tender.

In the circuit court there was a trial by jury, and the jury assessed the appellant's damages at \$45 ; also assessed its benefits at \$45, and the court rendered judgment against the appellant for the \$45 benefits, and in its favor for the \$45 damages. It is mildly suggested that this action of the court is erroneous, but there is no discussion of the question, and no valid reason suggested why the judgment should be reversed on account of this action of the court.

It is suggested that the court erred in some of its instructions to the jury. We have examined the instructions and do not think they contain any erroneous statement of the law which would have a tendency to mislead the jury, or for which the judgment should be reversed.

Counsel for appellant discuss the question as to the amount of damages assessed being too small, but no such question is presented by the record.

The appellant made a motion to tax all of the costs to the appellee, which was overruled, and this ruling is assigned as error.

Bowlus v. The State.

It is contended that appellant recovered a verdict and judgment for a larger sum in the circuit court than was awarded by the city commissioners; that under the practice in Indiana all the costs should be taxed to the appellee. The statute provides for the taxing of costs in cases on appeal from a justice of the peace to the circuit court when the judgment is reduced \$5, or on failure to increase the judgment a like amount when the appeal is taken by the party recovering before the justice, but this statute does not apply in such a case as this. The appellant in this case gained nothing by its appeal. It increased the assessment of damages in its favor \$20, but it increased the benefits assessable against it a like amount and the appeal availed it nothing.

We do not think the judgment should be reversed.

Judgment affirmed, at costs of appellant.

Filed Jan. 13, 1892.

No. 16,242.

BOWLUS v. THE STATE.

BILL OF EXCEPTIONS.—*Objections and Exceptions to Evidence.*—The negative evidence afforded by one bill of exceptions that a given objection was not made and a given exception was not taken because not shown by that bill, is overcome by the affirmative evidence of the other that the objection was duly made and excepted to at the time.

CRIMINAL LAW.—*Assault and Battery with Intent to Kill.*—*Plea of Self-Defence.*—*Peaceable Character of Prosecuting Witness.*—*State may Show in Rebuttal.*—On a trial for assault and battery with intent to kill, where the defendant pleaded self-defence, and testified to facts of which he claimed to have personal knowledge tending to show that the prosecuting witness was quarrelsome and vicious, it was not error to permit the State to introduce in rebuttal evidence of the general character of the prosecuting witness for peaceableness.

From the Fountain Circuit Court.

J. W. Sutton and *W. L. Rabourn*, for appellant.

A. G. Smith, Attorney General, for the State.

130	227
132	148
130	227
134	56
130	227
140	372
130	227
154	670

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MCBRIDE, J.—The appellant was convicted of an assault and battery with intent to kill.

On the trial he testified as a witness that prior to the commission of the alleged offence he was informed by some of his neighbors that the prosecuting witness had threatened to shoot him.

He was then asked the following question: "Now, I'll ask you to state if you know of his making any attacks with any knives or weapons on any one else?" The court permitted him, over the objection of the State, to answer the question, and he answered it, "Yes, sir." He then, in answer to questions propounded by his attorneys, testified to an occasion when the prosecuting witness had some trouble with another person, while both were engaged in a corn field cutting corn, when the prosecuting witness threatened to cut the other person with his corn knife, and that he, the defendant, separated them. Also of another occasion when the prosecuting witness sharpened his knife in anticipation of trouble, and that he took him away.

In rebuttal the State was allowed to call and examine witnesses as to the reputation of the prosecuting witness in the neighborhood where he resided for "peace and quietude." To this evidence the appellant objected and excepted.

The only alleged error argued by counsel for the appellant relates to this action of the court.

It is objected by the State that the question is not properly presented, for the reason that there are two bills of exceptions,—one purporting to contain all of the evidence, and the other partial; and that in that purporting to contain all of the evidence the objections to this testimony, made in the circuit court, were not sufficient to present any question. This is true, but the objections and exceptions are sufficiently shown by the other bill, and we are obliged to consider both bills of exceptions together. Both were filed within the time limited by the court, and both bear the approval and attestation of the presiding judge. The negative evidence

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afforded by one bill of exceptions that a given objection was not made and a given exception was not taken because not shown by that bill, is overcome by the affirmative evidence of the other that the objection was duly made and excepted to at the time. *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569.

The accused defended on the ground that he was acting in self-defence, and testified to an attack on him by the prosecuting witness, and that what he did was merely in repelling such attack.

The evidence of previous threats, made by the prosecuting witness, and communicated to the accused prior to the commission of the alleged offence, was competent in view of the defence made. Indeed, evidence of this character is held competent where the alleged threats were unknown to the accused; but, as bearing on the question of self-defence, where they have been previously communicated to the accused, they are clearly competent as tending to show what was in his mind at the time, and to justify his conduct. *Holler v. State*, 37 Ind. 57; *Wood v. State*, 92 Ind. 269; *Leverich v. State*, 105 Ind. 277. And, in connection with such threats, it is competent for the defence to show in such case the general reputation of the injured party for strength, ferocity, vindictiveness, quarrelsomeness, etc. *Wharton Crim. Ev.*, section 74; *Holler v. State, supra*; *Dukes v. State*, 11 Ind. 557; *Horbach v. State*, 43 Texas, 242; 1 *Wharton Crim. Law*, section 641.

One exercising the right of self-defence must necessarily act in view of the danger as it presents itself to his mind at the time; and, as tending to explain such action, it is competent for the defence not only to show previous threats against him by the injured party, and his general reputation for quarrelsomeness, strength, ferocity, etc., but he may put in evidence every fact legitimately tending to show that he had reasonable ground to apprehend serious danger to himself. We see no reason why he should, in such case, be limited to

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showing the general reputation of the injured party. While his knowledge of such general reputation is of course competent, why may he not also avail himself of his personal knowledge? If he personally knows the party attacking him to be quarrelsome, vindictive, revengeful, of great physical strength, etc., why is he not authorized to act upon such personal knowledge? If so, it is, of course, competent for him to prove such specific facts as were within his personal knowledge when the attack was made. We understand this to be the rule as laid down in *Fahnestock v. State*, 23 Ind. 231, and *Boyle v. State*, 97 Ind. 322.

The court, therefore, in permitting the accused to testify to facts of which he claimed to have personal knowledge tending to show that the prosecuting witness was quarrelsome, or vicious, or revengeful, did not err. This was, in our opinion, sufficient to authorize the State to introduce in rebuttal evidence of the general character of the prosecuting witness for peaceableness, or, as stated in the questions put to the witnesses, "peace and quietude."

The rule in such cases is thus stated by Mr. Bishop: "It is never competent for the prosecution to show, in the first instance, against the defendant, that the person slain was of good or peaceable character. But such evidence may be given in rebuttal, if the opposite has been testified to for the defence." 2 Bishop Crim. Law (3d ed.), section 612. See, also, *Pound v. State*, 43 Ga. 88; *State v. Potter*, 13 Kan. 414; *Dock v. Commonwealth*, 21 Grat. 909; *Ben v. State*, 37 Ala. 103.

There is no error in the record.

Judgment affirmed.

Filed Nov. 3, 1891; petition for a rehearing overruled Jan. 29, 1892.

Jacobs v. Ballenger.

No. 15,501.

JACOBS v. BALLENGER.

INTEREST.—Payments.—How Applied.—If a payment made by a debtor is not applied to the liquidation of any part of the indebtedness by the debtor or creditor, the law applies it; and if such indebtedness consists of a principal sum and interest, the law applies the payment first to satisfying the interest and the remainder to the principal.

SAME.—Option of Maker of Note to Pay in Whole or Part Before Due.—Method of Calculating Interest.—If a note drawing interest is payable in whole or part before due, at the option of the maker, the interest on each payment up to the time it was made should be cast up, and the payment applied first to the reduction of the interest and then to the reduction of the principal.

From the Boone Circuit Court.

T. J. Terhune and P. H. Dutch, for appellant.

N. Morris, L. Newberger and J. B. Curtis, for appellee.

ELLIOTT, C. J.—The appellant executed to the appellee the promissory note and mortgage, of which the former prayed the court to decree a cancellation. The note bears interest from date, and contains this provision: "The maker shall have the right to pay off the note, or any part of it, at any time." The note was payable ten years after date. Before the time specifically fixed for payment the appellant paid divers sums upon the note at different times, but neither he nor the appellee made any application of the payments, so that the question in the case is, how does the law apply the payments?

The trial court cast up the interest on each payment as it was made, and applied the payment first to the reduction of the interest, and then to the reduction of the principal. To convey a clearer meaning of the theory of the trial court, we will take, as an illustration, the course pursued with the first payment, since that will serve for all. The first payment was three hundred dollars, and its date May 15th, 1883, two

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years, three months and fourteen days after the execution of the note. The court computed interest on the sum paid, giving this result: "Payment May 15th, 1883, \$300; \$264.96 principal and \$35.10 interest."

The appellant's contention is that "The payments upon the note having been made before the note or any interest thereon became due, they should first be applied to the extinguishment of the principal." The appellee's position is that the court should have computed the interest due upon the principal to the time that each payment was made, added it to the principal, and deducted the payment from the aggregate amount. The trial court did not adopt the theory of either party, but, as we have seen, adopted an essentially different one. But, as the appellee is content, the only inquiry we need make is whether the theory acted upon by the trial court worked injury to the appellant.

The general rule undoubtedly is, that when a payment made by a debtor is not applied to the liquidation of any part of the indebtedness by the debtor or creditor, the law applies it; and where the indebtedness consists of a principal sum and interest, the law applies the payment first to satisfying the interest. *Green v. Vardiman*, 2 Blackf. 324; *Wasson v. Gould*, 3 Blackf. 18; *Markel v. Spittler*, 28 Ind. 488; *McCormick v. Mitchell*, 57 Ind. 248; *Longworth v. Higham*, 89 Ind. 352; *Dean v. Williams*, 17 Mass. 417; *Lash v. Edgerton*, 13 Minn. 210; *Baker v. Baker*, 4 Dutch. (N. J.) 13 (75 Am. Dec. 243); *Hunt v. Hurst*, 20 W. Va. 183; *Case v. Fish*, 58 Wis. 56; *United States v. McLemore*, 4 How. (U. S.) 286; *Story v. Livingston*, 13 Pet. 359.

If the note had been wholly due, there would be no difficulty in the case, since it is clear that, in that event, the case would have been within the rule, and, even as it is, there is plausibility, if not strength, in the appellee's contention that the rule covers the case. We do not think, at all events, that there was any error on the part of the trial court of which

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the appellant can successfully complain. If there was error it was against his adversary, and not against him.

The principal of the note became due *pro tanto* when the maker elected to exercise the right given him by the contract of making partial payment, and, certainly, he can not complain that he was charged with interest upon the part of the note he caused to mature by his own act. The creditor was not postponed as to interest until the expiration of the period absolutely fixed for the payment of the note, because the maker exercised the right given him by the contract to make the note due in whole, or in part, whenever he chose to do so. The holder of the note had no election for he could not have enforced payment until the time fixed, but the maker did have an election which he chose to exercise, and which the creditor could not prevent him from exercising. If we are right in holding that the maker by his own act caused the note to mature, *pro tanto*, as payments were made, then there can be no doubt that the conclusion reached by the trial court was not prejudicial to the appellant. This conclusion is required by the authorities. In the case of *Miami Exporting Co. v. Bank*, 5 Ohio, 261, a case very similar to the one before us, it was said that: "But it must be remembered that the notes here were payable on or before a certain day. Although the defendants could not compel payment before the day, yet the plaintiffs might pay before that time, and the defendants might be compelled to receive it. They could only be compelled to receive it upon the hypothesis that full payment was made, not only principal, but interest. If, then, partial payment only is made, it would seem to be but just that this partial payment should apply as well to interest as principal." The question came before the court in *Williams v. Houghtaling*, 3 Cow. 86, and it was said by the court: "Payments made on an instalment not due and payable, should be applied to the extinguishment of principal, and such proportion of interest as has accrued, on the principal so extinguished." The question

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we have here arose in the case of *Spires v. Hamot*, 8 Watts & Serg. 17, and it was held that partial payments must be applied to the reduction of the principal and the accrued interest. It was said by the court: "The rule established by all other decisions is that a partial payment is to be applied to the interest, in the first place, and in the second to the principal. The reason is that, though interest may be reserved to be paid yearly, half yearly or quarterly, it accrues from day to day, and not like rent from year to year." An illustration will, as we believe, make clear the correctness of the doctrine asserted in the cases to which we have referred. Suppose the appellant had elected to pay the entire amount due upon the note and mortgage, would he not have been required to pay the principal and accrued interest? It seems to us that in such a case there could be no doubt as to the rule, and the rule must be the same where the debtor elects to pay part of the debt he owes, instead of electing to pay the whole.

It is said by appellant's counsel that the appellant ought not to be held to pay interest for which he was not bound, but this argument is fallacious for the reason that he bound himself to pay interest from the date of the note.

We are referred to the case of *Starr v. Richmond*, 30 Ill. 276, but that case, even if well decided, is not in point, for there the creditor was not, as here, bound to accept a partial payment. In that case it is expressly declared that if the money had been due under the contract the rule as we have here stated it would apply.

Judgment affirmed.

Filed Jan. 14, 1892.

Lane et al. v. Utz.

No. 15,544.

LANE ET AL. v. UTZ.

DEED.—Construction.—Rule in Shelley's Case.—A deed which "conveys and warrants" certain real estate to the grantee, "and to the heirs of her body," falls within the rule in *Shelley's Case*, and vests in such grantee an absolute fee.

From the Clinton Circuit Court.

J. N. Sims, for appellants.

P. W. Gard, for appellee.

COFFEY, J.—This was an action by the appellants against the appellee, in the Clinton Circuit Court, to recover the possession of the real estate described in the complaint. The evidence in the cause consists of an agreed statement of facts. The appellee demurred to the evidence, which demurrer was sustained by the court, and judgment was rendered against the appellants for costs.

The facts in the case, as disclosed by the agreed facts, are that on the 24th day of July, 1866, Joseph Lane was the owner in fee of the land in controversy, and on that day conveyed the same to his unmarried daughter, Elizabeth Lane. Elizabeth subsequently intermarried with the appellee, Utz, and died intestate, without issue, leaving the appellee, her husband, as her only heir at law. Prior to her death her father, Joseph Lane, departed this life.

The consideration mentioned in the deed was never, in fact, paid, nor intended to be paid, the land being a gift, and the consideration inserted in the deed was intended to correspond with the sum advanced by Lane to his other children.

The appellants are the next of kin to the said Elizabeth.

The sole question presented for our consideration is the construction of the deed executed by Joseph Lane to his daughter, Elizabeth. So much of the deed as is material to the controversy here is as follows :

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"This indenture witnesseth, that Joseph Lane and Mary Lane, his wife, of Clinton county, in the State of Indiana, convey and warrant to Elizabeth Lane, and to the heirs of her body, of Clinton county, in the State of Indiana, for the sum of four thousand dollars, the following real estate, in Clinton county, in the State of Indiana, to wit: * * * In witness whereof," etc.

It is contended by the appellants that this deed conveyed an estate to Elizabeth Lane, subject to a reversion to the grantor or his heirs in the event she should die without children; while, on the other hand, it is contended by the appellee that it vested in her an absolute estate in fee simple.

In our opinion the case of *Tipton v. La Rose*, 27 Ind. 484, and the case of *King v. Rea*, 56 Ind. 1, are decisive of the question here involved.

In the case of *Tipton v. La Rose*, *supra*, the land was conveyed to Sarah M. Tipton and the heirs of her body by George T. Tipton. It was held that Sarah M. Tipton took an estate in fee simple. And in the case of *King v. Rea*, *supra*, the land was conveyed to Martha W. Rea during her life, and to the issue of her body, and in construing this deed this court said: "We think it falls within the rule in *Shelley's Case*, which, in this State, is settled as a law of property. The deed conveys and warrants to Martha W. Rea, during her life; the inheritance, which, by statute, is conveyed by the words 'conveys and warrants,' is limited to the issue of her body;—the inheritance and the remainder in the deed being the same estate. In such cases the rule in *Shelley's Case* applies, and the first vendee takes the entire estate." The words "issue of her body" were held to be words of limitation, and not words of purchase.

In the case of *Andrews v. Spurlin*, 35 Ind. 262, the deed conveyed the land to "Mary Wood her lifetime, and after her death to descend to the heirs of her body." It was held in this case that the deed vested in Mary Wood an absolute fee.

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In all these and similar cases the words "heirs," "heirs of her body," and "issue of her body," are words of limitation, and not of purchase, and the rule in *Shelley's Case* applies.

We are unable to perceive how the fact that this land was conveyed to Elizabeth Lane by her father as a gift or as an advancement can affect the well settled meaning of the words used.

In our opinion the deed before us vested in Elizabeth Lane an absolute fee in the land therein described.

Judgment affirmed.

Filed Jan. 16, 1892.

No. 16,285.

DEAN v. THE STATE.

130 237
150 76

CRIMINAL LAW.—Subsequent Admissions of Accomplice.—Declarations and admissions made by an accomplice, in the absence of the person on trial, long after the time when it is claimed that the crime for which such person is being tried was committed, are inadmissible.

SAME.—Two Counts.—One for Larceny and One for Receiving Stolen Goods.—*Declarations Improperly Received.—Error Cured by Verdict.*—But in such an instance, where the declarations relate to the receipt of the stolen goods, a verdict returned only on the count for larceny renders the error immaterial.

SAME.—Erroneous but Inconsequential Evidence.—Erroneous but vague and inconsequential evidence, that does not probably injure a defendant, will not work a reversal of a case.

SAME.—Instructions Depriving Jury of Right to Pass on Credibility of Prosecuting Witness.—An instruction that deprives a defendant of the right of the jury to consider, for what it is worth, evidence affecting the credibility of the prosecuting witness is erroneous.

SAME.—Felonious Taking.—Instruction Failing to State that in Larceny the Taking Must be so.—Failure to Distinguish Between Presumptions of Law and Fact.—An instruction reciting what is sufficient to constitute a larceny, but omitting to inform the jury that the taking must have been felo-

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nious in order to constitute the transaction a larceny, and also failing to distinguish between presumption of fact and law, is erroneous.

SAME.—*Defendant's Knowledge of Contents of Bundle Containing Money or of Felonious Taking.*—An instruction that if the defendant's wife took a bundle, containing money, alleged to have been stolen from a trunk in a room, and handed it out through a window to him and he took it, he would be guilty of larceny, is erroneous, for not also containing a statement that he must have known, in order to convict him, of the contents of the bundle, or that the money was taken with a felonious intent.

From the Sullivan Circuit Court.

J. S. Bays, for appellant.

W. C. Hultz and *J. T. Hays*, for appellee.

MILLER, J.—A prosecution was instituted against the appellant and his wife for larceny, and receiving stolen goods. The appellant was tried, separately, and convicted on the count in the information charging larceny.

During the trial the State introduced evidence, over the objections of the appellant, of declarations and admissions made by his wife, in his absence, long after the time when it was claimed the crime was committed.

This evidence was inadmissible for any purpose. *Reilley v. State*, 14 Ind. 217; *Garner v. Gordon*, 41 Ind. 92; *Dye v. State*, ante, p. 87; *O'Neil v. State*, 42 Ind. 346; *Kingen v. State*, 50 Ind. 557; *Card v. State*, 109 Ind. 415; *Roscoe Crim. Ev.*, 53; 1 *Greenl. Ev.*, section 111.

The court told the jury that such evidence could only be considered as applicable to the count charging the appellant with receiving stolen property; and that they should not consider it, or give it any weight against him, on the charge of larceny. The defendant, having been convicted alone on the count charging larceny, could not have been injured by the admission of this evidence.

The prosecuting attorney testified as a witness, and during the course of his examination in explaining his official conduct testified that his attention was called to the matter by

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a statement of an attorney employed in a civil suit growing out of the same transaction, to the effect that there was "crime there that ought to be investigated."

We are of the opinion that, while this evidence was not strictly admissible, it was so vague and inconsequential that it did not probably injure the appellant, and that it is not of sufficient importance to impose upon us the duty of reversing the judgment. *Henning v. State*, 106 Ind. 386 (400).

The prosecutor also stated that he delayed the institution of criminal proceedings against the appellant for a time on account of his desire not to interfere with civil suits then pending between the parties in relation to the transaction upon which the criminal proceedings were based. We see no error in the admission of this evidence. It does not assume that a crime had been committed.

Complaint is made that the court unduly limited the appellant in his cross-examination of some of the witnesses for the State.

An examination of the record discloses the fact that each of the witnesses was cross-examined at length, and, while we think that the court might have permitted some of the questions propounded to have been answered, we find no such abuse of the discretion, necessarily lodged in the trial court, as would justify us in disturbing the judgment.

There was evidence before the court and jury that the money which was the subject of the supposed larceny had been in the possession of the prosecuting witness, one John J. Martin, for several years. Martin had testified as a witness that he did not remember what he had told the assessor who had assessed him for certain years, nor did he remember what he had sworn to in his schedules as to the amount of money belonging to him. The appellant then gave in evidence his tax schedules for these years:

Upon this subject the court gave to the jury the following instruction :

" 14. The tax schedules of Mr. Martin were admitted in

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evidence as touching the question of the ownership of the money. If the money belonged to John J. Martin, then the tax schedules are no longer material. And, if you find from the evidence that the money did belong to Mr. Martin, you are not to consider the tax schedules any further on that point. Whether or not Mr. Martin is guilty of a wrong in connection with the tax schedules is entirely foreign to the question of defendant's guilt or innocence. If the money was Mr. Martin's, and the defendant stole it, or received it knowing it to be stolen, it could be no possible defence to him that Mr. Martin may have omitted it from his tax schedules."

This instruction deprived the appellant of the right of having the jury take this evidence into consideration, for what it was worth, as affecting the credibility of the prosecuting witness, and was therefore erroneous.

The nineteenth instruction given by the court is as follows:

"If you find from the evidence that the defendant said, when speaking of this money, with reference to himself and Nan, his wife, that 'We got it;' that 'we got it the night Uncle Jackey Martin's wife lay a corpse;' that 'Uncle Jackey Martin had between three and four thousand dollars stolen the night his wife lay a corpse,' and in attempting to account for these statements, or any of them, the defendant said, with reference to how they got it, that 'Nan got the keys and unlocked the trunk and took out the comfort and handed it out through a window to me,' and if you also find that this money was kept in a comfort, and that the comfort was kept in a trunk and the trunk had keys,—then you have a right to make the following inquiries, and ascertain from the evidence, if you can, whether or not Uncle Jackey Martin's wife ever lay a corpse; whether or not he ever kept any money in a comfort; whether or not he kept the comfort in a trunk; whether or not he kept the trunk locked; where he kept the trunk; where he kept the keys

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to that trunk, if any; what opportunities, if any, the defendant, or Nan Dean, had to know of Uncle Jackey Martin having any money; what opportunities they had of knowing whether or not he kept it in a comfort, and if so, where he kept the comfort, and if he kept the comfort in a trunk, where was the trunk the night Martin's wife lay a corpse; and whether John Dean and Nan Dean had opportunity of access to said trunk on that night, and whether or not they had, or either of them, had access to the keys of the trunk, and the length of time after such opportunity, if any, until such statements were made, and the probability of such statements having been made, unless they were true. And if you find from the evidence, beyond a reasonable doubt, that such statements were made and they were true, and that it occurred in Sullivan county, Indiana, within two years before the commencement of this action, your plain duty is to find the defendant guilty."

This instruction does not contain a concise statement of the law applicable to the case, and was well calculated to confuse and mislead the jury. It entirely omits to inform the jury that the taking must have been felonious in order to constitute larceny, and fails to distinguish between presumptions of fact and presumptions of law. *Smith v. State*, 58 Ind. 340.

The twenty-second instruction given by the court is as follows:

"If the money belonged to John J. Martin, and was in the trunk in his house, in the bed-room, on the night his wife lay a corpse, and Nan Dean, while occupying that room as a sleeping apartment, unlocked the trunk, took out the money and handed it out through a window to the defendant, and the defendant there took it in charge, the defendant would be guilty of larceny as much as his wife if she was guilty, and the defendant would be guilty under the first count."

This instruction is more concise than the nineteenth, but

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none the less erroneous. The defendant's wife was not on trial, and he could not be legally convicted of crime by comparison. It fails to state that in order to convict him the evidence must show that he had knowledge of the contents of the bundle handed him by his wife, or that the money was taken with a felonious intent.

Some objections are made to other instructions given by the court, and to instructions asked by the appellant, but as the judgment must be reversed on account of the error of the court in giving the instructions above set forth, and the questions of law involved in them are not likely to come before the court on a second trial, we will not extend this opinion by entering upon a discussion of their merits.

The judgment of the court is reversed, with instructions to grant a new trial.

Filed Jan. 14, 1892.

 No. 15,469.

STEWART, ADMINISTRATRIX, v. THE PENNSYLVANIA COMPANY.

NEGLIGENCE.—General Averment of Freedom from Contributory Negligence.—Specific Averment of Facts Overcoming.—A general averment that the plaintiff "was without fault or negligence in all said matter, and acted with prudence and with care in all said transactions," is sufficient to show that the plaintiff was free from contributory negligence, unless the specific averment of facts show that he was, notwithstanding, guilty of such negligence.

SAME.—Use of Senses and Exercise of Reasoning Faculties by Plaintiff.—A person is bound to use the senses, and exercise the reasoning faculties with which nature has endowed him; and if he fail to do so, and is injured in consequence, neither he, in life, nor his representatives after his death, can recover for resulting injuries.

From the Scott Circuit Court.

W. K. Marshall, for appellant.

S. Stansifer, for appellee.

130	242
131	536
130	242
134	437
130	242
137	910
139	145
130	242
143	386
143	412
143	652
130	242
157	219
130	242
162	244

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MCBRIDE, J.—While counsel have argued two alleged errors in this case, only one of them is assigned. The one error which is assigned, however, presents, substantially, every question involved in both, and rests on a ruling of the circuit court sustaining a demurrer to the second paragraph of the complaint.

The suit is by the appellant, as administratrix of the estate of William H. Stewart, deceased, who was killed by a train of cars on a line of railroad operated by the appellee.

The paragraph of complaint in question, omitting prefatory and concluding technical averments, is as follows:

"That, on the — day of —, 188—, the said William Stewart was in the employ and service of the defendant, in the capacity of bridge carpenter, and that said decedent, on the day last aforesaid, was engaged in said service of said defendant, at and on the Silver Creek bridge, which was a part of defendant's line of said road from Jeffersonville to New Albany; that the trains of defendant, going west on said railroad, ran on the north track, and the returning train ran on the south track, and when said trains were meeting and passing each other there was twenty-five inches, and no more of space between said trains; that it was the custom of the defendant to convey said bridge carpenters, including said Stewart, from Jeffersonville to the place of their work in the morning, and then stop said train for them to get off, and said train stopped only long enough to allow said workmen time to get off, and then reconvey said employees from said place back to Jeffersonville; that said place of stopping was not a place of stopping to receive or disembark passengers, and when said passenger trains stopped to allow said employees to get off the train, they were required to immediately and promptly get off from said train, so as to allow it to proceed on its trip; that the place where said train stopped to disembark said decedent and the other persons with whom he worked was on an embankment twelve feet high, and on the south side of decedent's train there was a

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broad level — of fifteen feet width, and on the north side of said train was the slope of the embankment, so close to the train as to afford no convenient opportunity to get off there; that the only convenient, and the usual place for said decedent and his fellow-workmen to get off from said train was on the south side of said train, and was a safe place except when the east bound train on the other track might be passing decedent's train while decedent and the other hands were disembarking, and while said other train was passing it was a dangerous place for said employees to disembark; that the time of starting said east and west bound trains from Jeffersonville was fixed by the defendant, and the defendant had negligently and carelessly failed and neglected to make any rules or regulations for the movement of said east bound train that required the employees running that train to check its speed while passing said west bound train, or that required said crew of hands, or any of them on the east bound train, to signal and give warning of their approach, by ringing the bell or sounding the whistle, but, on the contrary, required said train to run eastward at a rate of thirty-five miles per hour when passing from New Albany to Jeffersonville; that, on the morning of the day last aforesaid, said decedent and his fellow-workmen were conveyed on said defendant's said passenger train to their place of work, and stopped about one hundred yards beyond their tool chest, and decedent immediately proceeded to get off from said train, and was at the door of the car he had been riding in when his train came to a full stop, and went out on the steps of said car to disembark on the south side, and looked to see if there was any approaching train; that the steam and the smoke from the engine belonging to his train settled immediately down on the ground so thick and heavy that he could not and did not see the train approaching from the west, and the steam was escaping from the engine attached to the defendant's train, and made so much noise that decedent could not, and did not, hear the coming train, al-

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though he listened for it ; that said decedent looked and listened for said coming train as aforesaid to ascertain if it was safe for him to get off on that side, or at that time, but that in consequence of said smoke and steam, and having heard no signal or noise from said train coming from the west that indicated its coming, and not having been warned of its approach, he was led to believe that it was safe and proper for him to get off on said south side of the train and proceed across said track to his tool chest ; that, under said belief, induced by the acts and omissions of the defendant aforesaid, he stepped from said car he had been riding in onto the ground, and proceeded not more than six feet from the steps of said car, along the side thereof, when said train made its appearance through said smoke and steam, and was then running at the rate of thirty-five miles per hour, and struck and killed him. And plaintiff avers that decedent was without fault or negligence in all said matters, and acted with prudence and with care in all said transactions ; that the death of said decedent was caused by the wrongful acts and omissions of the defendant herein above stated," etc.

The demurrer to this paragraph of complaint was upon the ground that it did not state facts sufficient to constitute a cause of action.

To make it good it should contain averments of fact showing that the death of the decedent was caused by the actionable negligence of the appellee, and that the decedent was himself guilty of no negligence which contributed to his death. The conclusion we have reached on the latter question renders it unnecessary for us to consider whether or not actionable negligence on the part of the appellee is shown. The complaint contains the general averment that the decedent "was without fault, or negligence in all said matter, and acted with prudence and with care in all said transactions." This is sufficient, unless specific averments of fact in the complaint are sufficient to overcome it, and show that he was, notwithstanding, guilty of contributory negligence.

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City of Ft. Wayne, v. Dewitt, 47 Ind. 391; *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490; *Jeffersonville, etc., R. W. Co. v. Goldsmith*, 47 Ind. 43; *Town of Salem v. Goller*, 76 Ind. 291; *Murphy v. City of Indianapolis*, 83 Ind. 76; *Pittsburgh, etc., R. W. Co. v. Wright*, 80 Ind. 182; *Board, etc., v. Legg*, 93 Ind. 523; *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; *City of Wabash v. Carver*, 129 Ind. 552.

It is well settled, however, that the general averment of freedom from fault will be overcome, if the facts specially pleaded show that the injured party was guilty of negligence which contributed to his injury.

It is not averred that the decedent was ignorant of the manner in which, and times when, trains were run at the point where he was killed. Indeed, the averments of the complaint, coupled with the inferences which we are authorized to draw from the facts pleaded, are sufficient to charge him with full notice on that subject. He was working for the appellee on a bridge at that particular point, where he could not fail to have his attention drawn to all trains passing over the road during working hours, as they would, of necessity, pass over the bridge. He would, also, in the same manner, become familiar with the speed at which they were run. The complaint shows that every morning and evening he was conveyed to and from his work on one of the trains. It does not need the express averments of the complaint to inform us that while two trains were passing each other it was a dangerous place to disembark. He knew that the train that killed him was due, or might be expected at that time, for it is averred that he "looked and listened for said coming train, as aforesaid, to ascertain if it was safe for him to get off on that side, or at that time." As he looked and listened his senses must have warned him that it was unsafe, for the complaint informs us that the escaping steam and smoke from the engine on his own train, settling around him, rendered sight unavailing, while the noise of escaping steam from the same source made it impossible to hear the sound of

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an approaching train. He knew, therefore, as he stepped off the train, that he was deliberately stepping into danger to avoid the inconvenient, but safe landing on the other side. He erred as to the imminence of the danger, and the error cost him his life. In our opinion the facts specially pleaded entirely overcome the general averments of freedom from fault, and show, if they are true, that the decedent's death, whether partially due to negligence on the part of the appellee or not, was certainly, in some measure, due to his own negligence. A person is bound to use the senses, and exercise the reasoning faculties with which nature has endowed him. If he fails to do so, and is injured in consequence, neither he, in life, nor his representatives after his death, can recover for resulting injuries. *City of Plymouth v. Milner*, 117 Ind. 324; *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327.

Of the other error argued we will only say, in addition to what we have already said, that we have examined the question, and its consideration would not permit us to reach any different result if it was, in fact, properly before us.

Judgment affirmed, with costs.

Filed Jan. 23, 1892.

No. 15,205.

EWING v. JONES.

TRUST.—*Construction of Deed.—Revocation of Trust.—Meaning of Term "Legal Representative," as Used in Deed.—Testamentary Deed.*—The owner of land, for a recited money consideration, executed to a grantee a quitclaim deed, to have and "to hold the same to the" grantee, "in trust, for the uses and purposes following:" (1) "The trustee, as aforesaid, shall sell and convey all such part or parts of the real estate here-

130	247
130	597
130	600
130	247
131	361
132	224
132	240
130	247
149	2
149	91
149	431
130	247
1187	487

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by conveyed as to him shall seem most advantageous for the interest of the trust hereby created, and the proceeds thereof to invest for the same purposes for which this trust is created, to expend the same in improving such of the property hereby conveyed as the said trustee shall deem most advisable, and for the purpose of creating an income therefrom; (2) that of the income and profits arising under this trust a reasonable sum, such as said trustee shall deem to be sufficient, shall be expended for the maintenance of the grantor, and the remainder, if any, after paying taxes, insurance and necessary expenses, shall be expended for the benefit of the trust, when and at such times as the trustee shall think best;" (3) that upon the death of the said grantor the property hereby placed in trust shall descend to the legal representatives of the said grantor, "provided, however, that" the grantor's adopted brother "shall, under no circumstances whatever, inherit or be entitled to any part or parcel thereof."

Held, that the legal title vested in the trustee, and that he, with the consent of the grantor, could not revoke the trust.

Held, also, that the term "legal representative," as thus used, meant the heirs of the grantor.

Held, further, that the instrument was not a testamentary deed.

From the Vanderburgh Circuit Court.

T. J. Walker, F. Ullman and R. E. Pendarvis, for appellant.

J. E. Iglehart and E. Taylor, for appellee.

ELLIOTT, C. J.—The question in this case is, who owns the real estate in controversy? The question as it is presented by the record is to be solved by determining the meaning and effect of an instrument executed by George W. Ewing, Junior, to George W. Ewing, Senior, on the 31st day of December, 1863. The introductory clause of the instrument reads as follows: "This indenture witnesseth that George W. Ewing, Junior, a devisee of William G. Ewing, deceased, late of Allen county, Indiana, in consideration of six hundred dollars, and other good and sufficient consideration, does by these presents give, grant, bargain and sell to George W. Ewing of Cook county, Illinois, the following described real estate." This clause is followed by a specific description of a large number of parcels of real

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estate. Following the description of the property are these provisions: "To have and to hold the same to the said George W. Ewing, in trust, for the uses and purposes following, to wit:

"First. The said George W. Ewing, trustee, as aforesaid, shall sell and convey all such part or parts of the real estate hereby conveyed as to him shall seem most advantageous for the interest of the trust hereby created, and the proceeds thereof to invest for the same purposes for which this trust is created, to expend the same in improving such of the property hereby conveyed as the said trustee shall deem most advisable, and for the purpose of creating an income therefrom.

"Second. That of the income and profits arising under this trust, a reasonable sum, such as the said trustee shall deem to be sufficient, shall be expended for the maintenance of the said George W. Ewing, Junior, and the remainder, if any, after paying taxes, insurance and necessary expenses, shall be expended for the benefit of the trust, when and at such times as the trustee shall think best.

"Third. Should the trustee die before his said ward, that Jesse Holliday, of San Francisco, California, or, upon his refusal to act, such person as the court of common pleas of Allen county, Indiana, shall appoint, shall take up and continue this trust.

"Fourth. That upon the death of the said George W. Ewing, Junior, the property hereby placed in trust shall descend to the legal representatives of the said George W. Ewing, Junior, provided, however, that William G. Ewing, Junior, adopted son of William G. Ewing, deceased, shall, under no circumstances whatever, inherit or be entitled to any part or parcel thereof."

On the 1st day of March, 1866, the grantee in the deed from which we have copied reconveyed to the grantor the property embraced in the deed, and not disposed of by the trustee under its provisions. In the latter conveyance it is

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declared to be the intention to revoke the trust, and to re-invest the creator of the trust with absolute title to the property remaining in the trustee.

If there was power in the creator of the trust to revoke it, the appeal must fail; if there was no power of revocation, the appeal must be sustained.

That a trust is created, and created by a deed, there can be no doubt. The instrument is in form a deed, the appropriate words of conveyance are employed, the trust is well described, the beneficiaries designated, and the trustee duly named.

The deed also recites the payment of a consideration by the grantee, which, as the record now presents the case, can not be regarded as a mere nominal one. There is no element of a valid trust absent; every one of the essential requisites of a trust are present. If, therefore, the creator of the trust has power to revoke it, that power must exist because he is the sole beneficiary in the trust, no others having any vested rights. It is, of course, quite clear that the creator of a trust can not revoke it or the trustee destroy it by a reconveyance, if other persons have a vested interest in the trust.

The creator of this trust had an interest in it under the express provision that the property should, so far necessary, be used for his maintenance and support, and this express provision goes far towards showing that this was the only interest left in him, for the express mention of one thing implies the exclusion of all others. We do not affirm that this provision of itself controls the entire instrument, but we do affirm that it exerts an important influence. It is simply the application of a plain principle of logic to assert that where a man conveys lands, reserving to himself support and maintenance out of the estate conveyed, he conveys all other right and interest of which he is possessed. The express provision vesting in the creator of the trust the interest just mentioned must be taken in connection with the provision in the fourth paragraph of the deed, and that pro-

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vision certainly vests some interest and estate in other persons. It declares that in the event of the grantor's death "the property shall descend to the legal representatives of the said George W. Ewing, Junior, provided, however, that William G. Ewing, Junior, adopted son of William G. Ewing, deceased, shall, under no circumstances, inherit or be entitled to any part or parcel thereof." If the grantor had used almost any other term than "legal representatives," there could be no question as to the effect of his deed. That term we can not hold controls the entire instrument. In a just sense, heirs or descendants are often legal representatives of a deceased person, and the deed before us declares that the property "shall descend," and to descend it must go to heirs or descendants.

In *Warnecke v. Lemboa*, 71 Ill. 91, it was said: "Legal representative, or personal representative, in the commonly accepted sense, means administrator or executor. But this is not the only definition. It may mean heirs, next of kin or descendants."

It was said in *Grand Gulf, etc., Co. v. Bryan*, 8 S. & M. (Miss.) 234: "In legal parlance, the executor or administrator is most commonly called the legal representative. Still, in regard to things real, the heir is also the legal representative, and so is a devisee, who takes by purchase. Heirs may be the legal representatives, or they may not." Another court says: "But it is held that even in cases where the death of the party to be represented is in contemplation, the context of the instrument may change the usual meaning of the words in the given case." *Merchants' Nat'l Bank v. Abernathy*, 32 Mo. App. 211. Other courts declare that the term may mean heirs, assignees or receivers. *Davis v. Davis*, 26 Cal. 23; *Phelps v. Smith*, 15 Ill. 572; *Barbour v. Nat'l, etc., Bank*, 45 Ohio St. 133; *Hammond v. Mason & Hamlin Organ Co.*, 92 U. S. 724. Here the words with which the term is associated show its meaning. The word "descend" can not with propriety be construed to mean an executor or administrator, since

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land goes by descent to heirs or descendants. The exclusion of the adopted son from inheritance shows that the author of the trust intended to vest the remainder in those who succeeded by inheritance or descent. The subject-matter is land, and when the term "legal representatives" is used with reference to land it ordinarily means those to whom the land descends. The whole scope and tenor of the instrument indicates that the remainder was created for descendants or heirs. This was expressly decided, and decided upon the very deed before us, by the Supreme Court of Minnesota. We, however, give the case extended discussion, for the reason that appellee's counsel say of counsel in the Minnesota case that "he admitted away his case, or nearly all his case," and not because we doubt the soundness of the decision in that case. In the case just mentioned, *Ewing v. Warner* (Minn.), 50 N. W. R. 608, the court said: "The term 'legal representatives,' in the fourth subdivision of the declaration of the trust, is evidently used as synonymous with 'heirs,' or those to whom the property would have descended had the grantor died seized of it."

The absence of the technical word "heirs" does not destroy the effect of the deed, for, under our statute, the courts must determine from the general scope and tenor of the instrument what estate the grantor conveyed. In the deed before us the grantor invests the grantee with power to sell, carves out for himself an interest,—the right to maintenance,—and provides for the continuance of the trust for the benefit of his heirs, or descendants. In carving out the special interest he necessarily provided that the remainder should vest elsewhere than in him. A construction which would make the deed mean that the grantor created a trust simply to secure himself support and maintenance would not be a reasonable one, nor can such a construction be adopted without doing violence to the general tenor of the instrument, and contravening settled rules of law. The dominion over the property which the deed vests in the trustee carries to him the fee. If the fee was carried into the trustee, it cer-

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tainly went out of the author of the trust. It was in one or the other ; it could not dwell in both of them. That the fee went into the trustee is not doubtful, for the authorities declare that where a trust is created with an absolute power to sell, the fee vests in the trustee. Mr. Perry thus states the rule : "If land is conveyed to trustees, without the word heirs, in trust to sell, they must have the fee, otherwise they could not sell." Perry Trusts, section 315. In *North v. Philbrook*, 34 Me. 532, it was said : "As a general rule, such a quantity of estate will be held to be vested in trustees as is required for the performance of the trust ; and therefore if land be given to a man, without the word ' heirs, ' and a trust be disclosed which can be satisfied in no other way but by the trustees taking an inheritance, it has been held that a fee passes ; so, where there is a trust for sale, that is a purpose which it is impossible to serve unless the trustees have an inheritance, for if they are to sell a fee, they must have a fee." This is the doctrine of our court. *Locke v. Barbour*, 62 Ind. 577. It is, indeed, the doctrine of all the cases. But this case stands not alone upon the rule asserted by the authorities referred to, for the grantor reserved an interest to himself, clearly defined it, and made provision for the remainder. It seems very clear that, as the record presents the case to us, all of the estate except that expressly reserved passed from him, and lodged in the trustee ; and the only possible question can be, in whom did the interest in remainder vest ? So we come again to the provision of the fourth paragraph in the declaration of trust. That we were right in holding that the heirs of the author of the trust are designated, we have already assigned reasons, and adduced authority ; but we may add with propriety this further reason : It is not conceivable that a trust was created for an executor or administrator, since there is no imaginable reason why the remainder should be given to persons unknown, and whom the author of the trust could not have had in mind.

The fact that a trust is created without consideration, and

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is, in effect, the gift of land, does not change the rule. The trust is duly evidenced, and the title of the trustee and beneficiaries became vested upon the delivery of the deed. The author of the trust can not revoke it, unless fraud or mistake is shown, and no such issue is here made. This is the settled doctrine. Our own decisions have given the question full consideration. In *Gaylord v. City of Lafayette*, 115 Ind. 423, the authorities were examined with care, and the court said: "A voluntary trust, resting upon a meritorious consideration, and perfectly created, is irrevocable." At another place in the same opinion it was said: "A trust may be said to be executed when it has been perfectly and explicitly declared in a writing duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed, or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done, except that the trustee, without any further act or appointment from the settlor, carry into effect the intention of the donor as declared. In such a case, even though there was no valuable consideration upon which the trust was originally declared, a court of chancery will enforce it in favor of one whose relation to the donor was such as to show a good or meritorious consideration." This doctrine is asserted in *Wright v. Moody*, 116 Ind. 175, and the general principle is enforced in *Waterman v. Morgan*, 114 Ind. 237 (240), where many of the cases are collected. Mr. Perry says: "A completed trust without reservation of power of revocation can only be revoked by consent of all the *cestuis*. If a voluntary trust for the benefit, wholly or partly, of some person or persons other than the grantor is once perfectly created, and the relation of trustee and *cestui que trust* is once established, it will be enforced, although the settlor has destroyed the deed, or has attempted to revoke it by making a second voluntary settlement of the same property or otherwise, or if the estate, by some accident, afterwards becomes revested in the

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settlor. In all these cases the first perfectly created trust will be upheld, with all its consequences, and the settlor be declared a trustee. A trust once created and accepted without reservation of power can only be revoked by the consent of all parties in interest; if any of the parties are not in being, or are not *sui juris*, it can not be revoked at all." 1 Perry Trusts, section 104. Many cases are cited by the author.

Counsel for the appellee contend that the instrument is testamentary, and hence revocable at the pleasure of its author. If it is solely testamentary, the conclusion deduced is valid, but we can not so regard it. There is nothing in it from beginning to end that indicates by even the remotest intimation that it is a will, or partakes of the nature of a will. In form and substance, in recital and declaration, it is a deed of trust. It professes to be a deed, it expresses a consideration, its words are those of a deed, its declaration of a present trust is clear and emphatic. Not a word or provision contained in it indicates a design to have it operate as a testamentary instrument. It creates an effective trust, no power of control is left in the grantor, no provision is made for accounting to him, provision is made for succession in the trust in the event of the trustee's death, and provision is made for the beneficiaries who take under the deed. If we should hold this deed to be a mere testamentary disposition of property, we should go counter to principle and authority, and should lay down a rule that would make all instruments carrying a trust beyond the life of the testator mere ambulatory testamentary instruments. That we can not do. We have examined with care the Pennsylvania cases brought to our attention by counsel, but we can not regard them as of controlling influence. Those cases are *Frederick's Appeal*, 52 Pa. St. 338, *Rick's Appeal*, 105 Pa. St. 528, and *Gingrich's Appeal*, 17 Alt. R. 33. The last named cases rest on the case first named, and that, as it is explained in *Rick's Appeal*, *supra*, is not in point.

In the case last mentioned, in speaking of the case first

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named, the court said: "It was held that the instrument was in effect a mere power of attorney; an instrument of agency and revocable at pleasure; that the deed was made for the grantor's own personal convenience; that the trustees were to account to him for all they did under the powers vested in them, and that no beneficial interest was to vest in his children till after his death." In *Turner v. Scott*, 51 Pa. St. 126, the instrument under consideration was utterly unlike the one before us, for it provided that "It should in no way take effect until after the grantor's death." The deed before the court in *Symmes v. Arnold*, 10 Ga. 506, was not a deed of trust vesting a present interest, but a deed wherein it was provided that after the death of the grantor "from thenceforth" the property should be that of the grantees absolutely.

It is unnecessary for us to approve or disapprove the reasoning in any of the cases referred to, for it is sufficient to assert that no one of them is relevant to the point here in dispute. In *Cox v. Curiwen*, 118 Mass. 198, it was simply held that there was nothing in the deed from which it could be inferred that the words "legal representatives" were used as meaning heirs. But it is doubtful whether the decision in that case is sound, since the term "legal representatives," when used respecting land, means heirs, and not those who can take only the personal estate. As said by the Supreme Court of the United States, in *Dunrow v. Walker*, 2 Dallas, 205, in speaking of the term "legal representatives:" "For, though the expression might, in the abstract, appear equivocal and ambiguous, it was explained by the subject-matter; and land, *ex vi termini*, importing real estate, the legal representative, must, in legal contemplation, be the heir and not the administrator." But whatever else may be said of the soundness of the decision in *Cox v. Curiwen*, *supra*, it is safe to say that it is not influential here, for the reason that the instrument there construed was radically different from the one with which we are here concerned.

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We are referred to the case of *Nearpass v. Newman*, 106 N. Y. 47, but the instrument upon which the court acted in that case bears very little resemblance to the one before us. In that case the grantor conveyed the land in trust for his wife and children, but made no provision for a successorship in the trust, nor for the disposition of the property after the death of the author of the trust. Not only was that instrument different from the one we have here under consideration in the particulars indicated, but it was also different in the essential feature exhibited in the quotation from the opinion in that case which follows, and is this: "It was also provided that Neefus should reconvey the property to Newman in case the said Harriet 'should fail to comply or perform in good faith her part of the covenants herein contained,' and finally it was declared that 'said quit-claim deed, also said bond with collateral and the bill of sale, all to be in escrow (said Neefus the party) to be delivered when said Harriet faithfully performs all her covenants hereinafter contained.'" That this provision exerted an important influence is obvious. It was, indeed, regarded by the court as controlling, for it was said: "The idea that the property was to be reconveyed to Newman if Harriet failed to perform her contract, is inconsistent with the theory of any personal interest in Neefus, while it was essential to the performance of his trust, as well as the enforcement of the security, that he should have the title of the property, with the power of converting it." In this case there is an absolute trust fully declared, and the estate in expectancy is vested in the heirs of the author as the beneficiaries, for there is no power reserved to revoke or reconvey.

We have examined the case with care, without assuming that counsel have, as in the Minnesota case, made any admissions, and we have reached the same conclusion as that declared by the Supreme Court of Minnesota in *Ewing v. Warner*, *supra*. We can not escape the conviction that

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the instrument before the court in that case, and before us in this, was correctly construed and enforced.

We are referred to a class of cases of which *Garnsey v. Mundy*, 24 N. J. Eq. 243, and *Aylsworth v. Whitcomb*, 12 R. I. 298, are types, and asked to apply the rule they assert to the case at our bar. But it is evident that, even if the instruments there under consideration were in legal effect the same as that before us, we could not, under the issues in this case, apply the rule asserted in these cases. Here the parties stand upon the words of the deed; there is no pleading averring directly or indirectly that there was fraud or mistake. We decline, therefore, to enter upon an inquiry as to what the rule would be if the deed should be assailed upon the ground of fraud or mistake. Whether equity will relieve upon the ground of fraud or mistake is not a question presented by the record, and we give no opinion bearing upon it.

Judgment reversed.

Filed Jan. 28, 1892.

No. 14,952.

THE TERRE HAUTE AND LOGANSPORT RAILROAD COMPANY v. NELSON.

STREET IMPROVEMENT.—*Extension of Time for Completing Improvement.*—In the absence of fraud, the time for the completion of a street improvement under a contract may be lawfully extended by a vote of the common council.

From the St. Joseph Circuit Court.

J. G. Williams, for appellant.

L. Hubbard, for appellee.

OLDS, C. J.—This action came into the circuit court on an appeal taken by the appellant from a precept issued to

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the treasurer of the city of South Bend for the collection, in favor of the appellee, of certain assessments made by the city council of that city on account of the paving of South Main street.

The common council of the city of South Bend passed an ordinance on the 1st day of October, 1887, for an improvement on Main street. By the ordinance the sidewalks on both sides of South Main street, within certain specified limits, were ordered graded and paved six feet in width with good, hard burned paving brick, and curbed in with sound oak plank; the work to be completed by the contractor before the 1st day of January, 1888.

Advertisement for constructing the work was made, and the appellee contracted with the city to do the work, to be completed as stipulated in the ordinance by the 1st day of January, 1888. On the 9th day of January, 1888, the appellee presented a petition to the mayor and common council of the city asking for an extension of time in which to do the work, and the council granted an extension of time until June 1st, 1888. On May 21st, 1888, appellee again presented a petition to the mayor and common council asking a further extension of time within which to do the work, and the time was extended until the first meeting of the common council, in August, 1888. On July 23d, 1888, appellee filed his petition for a final estimate of the work. Final estimate was made and precept properly issued.

The only objection to the proceedings urged by counsel for the appellant for which a reversal is asked is on account of the extension of time by the common council. It is contended that the common council had no authority to extend the time for the completion of the work, and that the appellee could not recover for the work, and had no right to have a precept issue for the collection of the sum due for the same, unless done and completed within the time named in the original contract.

It is exceedingly doubtful whether the question discussed

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by counsel is properly presented, but, conceding that it is, the objection urged is not well taken. It has been expressly decided by this court that, in the absence of fraud, the time for the completion of a street improvement under a contract may be lawfully extended by a vote of the common council. *Jenkins v. Stetler*, 118 Ind. 275; *City of Lafayette v. Fowler*, 34 Ind. 140.

The work is contracted for by the city. The city has the supervision of the work, and there is, in our opinion, no valid reason why it may not, in a proper case, extend the time stated in the contract for the completion of the work.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 28, 1891; petition for a rehearing overruled Feb. 6, 1892.

130	280
131	201
130	280
147	614
130	280
149	34
130	280
155	577
130	280
166	475
167	137

No. 16,129.

MASON ET AL. v. ROLL, EXECUTOR, ET AL.

APPEAL.—Probate Jurisdiction.—Appeal within Ten Days.—Contest of Will.—Suit to Quiet Title.—The provision of the decedent's act requiring a bond to be filed within ten days in order to take an appeal from any decision growing out of any matter connected with a decedent's estate, is only applicable to cases where the probate jurisdiction is involved, and has no reference to an action where the validity of a will is involved, or a suit to quiet title is brought by the executor. *Elliott's Supp.*, section 417.

QUIETING TITLE.—Practice.—Striking Out Special Answer.—In an action quieting title it is not error to strike out a special answer when the general denial is on file.

WILL.—Suit by Executor to Quiet Title to Land Devised to Him.—Attacking Validity of Will by Cross-Complaint.—In an action brought by an executor, claiming the right under the will of his decedent to sell certain real estate devised, against the heirs of such decedent, to quiet title, the validity of the will is necessarily involved, and the judgment quieting title will bar a subsequent action between him and them for its con-

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test; and such heirs may, by a verified cross-complaint, attack the validity of such will, and have the probate thereof set aside.

From the Marion Circuit Court.

A. F. Denny, for appellants.

J. C. Green, L. Ritter and E. F. Ritter, for appellees.

MILLER, J.—The complaint in this case averred, in substance, that Solomon Roll, during life, owned a tract of real estate therein described; that in June, 1889, he died testate, leaving a will, in which he directed the plaintiff, who was named as executor, to sell his real estate to pay certain legacies; the will was duly probated, and subsequently the executor was ordered by the court to sell the real estate as directed in the will; that the defendants, who are certain of the children and heirs of the testator, have notified the executor, and have given out in speeches, that they, as children and heirs of said Roll, have an interest in the real estate, and that they deny the legality of the order for the sale of the real estate, and assert that the plaintiff has no right or authority to sell said real estate; that by their acts, claims and demands they have cast a cloud upon the title of the real estate and upon the plaintiff's right to sell the same. The prayer is that the defendants be brought into court to show cause why the real estate shall not be sold, and that the plaintiff have a decree against the defendants, forever quieting his title as such executor, and that they be forever enjoined from asserting any right, title, claim or demand to the same.

The defendants answered the complaint by a general denial, and a second paragraph, which was subsequently, on motion of the plaintiff, struck out.

Afterward a verified cross-complaint was filed by the appellants against the plaintiff, their co-defendants, and the other heirs of the testator, alleging, among other things, the undue execution of the will, and that the testator was at the time of its execution of unsound mind.

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The cross-complainants asked that process issue for the defendants not before the court, and that upon final hearing the will and its probate be declared invalid, and that it be vacated, annulled and set aside.

The plaintiff moved the court to strike this cross-complaint from the files, for the reason that there was no bond filed with it, as required by law.

This motion was sustained and exception taken.

The cause was tried by the court, who found for the plaintiff, and entered a decree establishing the due execution and validity of the will, and quieting the title of the plaintiff, as executor, for the use and benefit of the trust, and forever enjoined and restrained the appellants from asserting any interest in, or right or title to, the real estate, or any part thereof.

The appellees have interposed a motion to dismiss the appeal, which we will notice before examining the questions presented by the assignment of errors.

It is claimed that this appeal is governed by section 2454, R. S. 1881, and section 2455 as amended (Elliott's Supp., section 417). These sections provide that any person considering himself aggrieved by any decision of a circuit court or judge thereof in vacation, growing out of any matter connected with a decedent's estate, may prosecute an appeal to this court, by filing an appeal bond within ten days after the decision complained of, and filing the transcript in this court within thirty days after filing the bond.

This procedure is applicable to cases where the probate jurisdiction of the court is involved, but does not govern appeals in actions authorized by the code, not involving the exercise of the probate jurisdiction of the court. *Koons v. Mellett*, 121 Ind. 585; *Simmons v. Beazel*, 125 Ind. 362.

This action is, in its essential features, one to quiet title. *Faught v. Faught*, 98 Ind. 470 (475); 1 Pomeroy Eq., section 171. Actions to quiet title do not involve the probate jurisdiction of the court, and this action might have been

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brought in the superior court, which has no probate jurisdiction whatever. The appeal was well taken under section 633, R. S. 1881.

The appellants have waived, by failing to discuss them, all questions except the rulings of the court in striking out the second paragraph of answer, and the cross-complaint.

The action being one to quiet the title to real estate, and the appellants having filed their general denial to the complaint, they were entitled under it to give in evidence every defence to the action, either legal or equitable (sections 1055 and 1071, R. S. 1881); and, therefore, they were not harmed by the ruling of the court in striking out the second paragraph of answer. *Sharpe v. Dillman*, 77 Ind. 280; *O'Donahue v. Creager*, 117 Ind. 372; *Johnson v. Pontious*, 118 Ind. 270; *Green v. Glynn*, 71 Ind. 336.

The ruling of the court in striking out the cross-complaint is the important question in the case.

The action to quiet title, brought by the executor against the appellants, was an assertion on his part of the validity of the will of Solomon Roll. His title was founded and bottomed upon the will. If the will was valid and effective, his title and right, as executor, to carry out its provisions was unquestionable. If, on the contrary, the will was invalid the land descended to the heirs of the deceased, and the executor had neither title to nor dominion over it.

The appellants were challenged by the action to assert the interests they claimed, and to break down and destroy, if they could, the chain of title under which the executor claimed.

This necessarily involved the validity of the will, and the judgment establishing it will bar a subsequent action between the same for its contest. *Faught v. Faught*, *supra*.

Under the provisions of the code the appellants had three years in which to institute proceedings for the contest of the will. Section 2596, R. S. 1881. This time was given them

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by statute, and the courts have no power or authority to compel them to proceed under the statute to make a contest within any shorter period of time. If, as was done in this case, an executor can bring the heirs before the court soon after his qualification as executor, in a proceeding to quiet title, and compel them to either proceed under the act relating to the contest of wills, or be forever barred of that privilege, it will work a practical deprivation of an important right given them by statute.

We are of the opinion that the provision in the act (section 2596) regulating the contest of wills, which requires the complaint, or "allegation in writing," as it is called, setting forth the grounds of the contest, to be verified, and a bond to be filed by the contestor, conditioned for the due prosecution of the action and payment of costs, is applicable only to cases where the contestor is the moving party; and that when an heir is, without his consent, brought into a court of equity by the executor of the will of his ancestor, or some other adversely interested party, and compelled, either to contest the will in that action, or permit its validity to be finally adjudicated against him, he may avail himself of all defences open to a defendant in a suit in equity, including the right to file a cross-action, bringing all parties in interest before the court, and contesting the will, just as he could have done had the statute never been enacted. In other words, that where an action of this kind is brought by an executor, it is a suit in equity, and may be defended as such without regard to our statute providing for the contest of wills.

This does not deprive the executor of the privilege of having the provisions of wills construed, or the title of land devised to him quieted, where, in his opinion, this is necessary to the administration of the trust, and at the same time preserve to the heir the benefit of the legislation enacted in his favor and for his protection.

The judgment is reversed, with instructions to grant a new

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trial, and to overrule the motion to strike out the cross-complaint, and for further proceedings in accordance with this opinion.

Filed Feb. 3, 1892.

No. 16,154.

HENDRYX v. THE STATE.

POOR PERSON.—*Review of Discretion of Trial Court in Refusing to Award Counsel to Defend a Poor Person.*—The discretion of a trial court in refusing to award counsel to a defendant on trial, upon his application as a poor person, is subject to review in the Supreme Court.

SAME.—*Power of Court to Award Counsel to Defend.*—A trial court has ample power to award counsel to defend a person charged with crime who is too poor to secure counsel to present his defence.

SAME.—*Parents of Defendant Able to Secure Counsel for Him, but Refusing to do so.*—The fact that the parents of the defendant are amply able to secure for him counsel is no reason for refusing to assign him proper counsel when they refuse to do so.

SAME.—*Attorney Volunteering Services After Court's Refusal to Appoint.*—*Error not Cured.*—If a court erroneously refuse to assign counsel, the error is not cured by an attorney offering his services and conducting the defence over the protest of the accused, and which services the accused declines to accept.

From the Elkhart Circuit Court.

H. D. Wilson, W. H. Vesey and C. W. Miller, for appellant.

J. T. Sullivan, Prosecuting Attorney, and J. H. State, for the State.

COFFEY, J.—The appellant was indicted in the Elkhart Circuit Court at the December term, 1890, for the murder of one Edmond Caulkins. Upon a trial by jury he was found guilty of murder in the second degree, and, over a motion for a new trial, he was sentenced to imprisonment in the State prison for the period of his natural life.

Among the many reasons urged here for a reversal of the

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judgment there is but one, we think, properly presented by the record, and that is that the circuit court erred in refusing to permit the appellant to defend as a poor person, and to assign him counsel for his defence.

Section 260, R. S. 1881, provides that "Any poor person, not having sufficient means to prosecute or defend any action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defence, who shall do their duty therein without taking any fee or reward therefor from such poor person."

As to whether a person shall be permitted to prosecute or defend an action, as a poor person, and shall have counsel assigned him for that purpose, under this statute, is, of necessity, largely in the discretion of the trial court, but the exercise of such discretion is subject to review by this court. *Keyes v. State*, 122 Ind. 527; *Hoey v. McCarthy*, 124 Ind. 464.

The application in this case to be permitted to defend as a poor person was supported by the affidavit of the appellant, and discloses the following facts: The appellant was arrested and confined in the jail of Elkhart county on the 10th day of January, 1891, where he had remained until the time of making the application. The indictment upon which he was tried was returned by the grand jury on the 19th day of the same month. The appellant was a married man, twenty-six years of age, and at the time of his arrest resided in the city of Chicago. He and his parents formerly resided in Elkhart county, Indiana, but had recently removed to the city of Chicago. Neither the appellant nor his wife had any property, of any kind, except wearing apparel, which was scarcely enough to keep them comfortable. The father and

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mother owned real estate in Elkhart, Indiana, jointly, of the probable value of \$5,000, were on good terms with the appellant, but refused to aid him in his defence or furnish any means for that purpose. He was wholly unable to employ or procure counsel by reason of the fact that he had nothing with which to pay.

The State was represented by the prosecuting attorney and his deputies, and by Hon. John H. Baker, the latter having been appointed by the court to assist in the prosecution. It was further shown that Mr. Baker was a lawyer of thirty years' experience in criminal practice, and possessed much influence with the jurors of the county.

The appellant in his affidavit in support of his application protests his innocence of the crime charged against him.

The facts set forth in this application, so far as they relate to the appellant's pecuniary condition, are not denied.

The ground upon which the court refused the application appears by its written opinion filed in the cause.

It appears that the court reached the conclusion, that, by reason of the fact that the parents of the appellant possessed means with which they could employ counsel, he was not a poor person, within the meaning of the statute.

In this conclusion we think the learned court erred.

The appellant had reached his majority, had married, and had a family of his own. If his parents refused to contribute of their means to aid in defence of their son, the result, as to him, was the same as if they had been penniless. If the parental affection was not sufficiently strong to induce them to come to his aid, there was no process by which they could be coerced, and his condition was as hopeless as if he had been an orphan. Their means, if they refused to place them at his disposal, could not aid him in procuring counsel to assist him in the defence of a charge the most serious known to the law; and, if they refused to aid him, the property possessed by them should not have been considered in determining whether he was, in fact, a poor person

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within the meaning of the law. The showing made by the application in this case, uncontradicted and not disputed, as it seems, clearly brought the appellant, we think, within the letter and spirit of the statute above set out.

The power, as well as the duty of the court, to assign to poor persons, charged with serious crimes, counsel for their defence, upon a proper showing, is no longer open to dispute in this State. *Board, et al., v. Courtney*, 105 Ind. 311; *Keyes v. State, supra*; *Stout v. State*, 90 Ind. 1; *Webb v. Baird*, 6 Ind. 13.

In the case of *Webb v. Baird, supra*, it appeared that Mr. Baird had been appointed by the circuit court to defend a person charged with burglary. The county of Tippecanoe, in which the prosecution was had, refused to pay for such services, claiming that the court had no power to bind it by such appointment, and suit was brought to compel payment, and in answer to the position assumed by the county this court said: "But that the services rendered by *Baird* were necessary to be rendered by some attorney, will scarcely admit of argument. It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. * * * The defence of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the court, and to the public."

At the time of the assignment of the attorney named in this case there was no statute authorizing the action of the court, but it was held that, as such appointment was necessary to accomplish the ends of public justice, the court possessed the inherent power to make the appointment in the absence of a statute.

In the case of *Board, et al., v. Courtney, supra*, Mr. Courtney was assigned as counsel for a defendant in a case which had gone from Montgomery county to the county of Parke, on a change of venue, and it was contended by Montgomery

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county that Parke county should be charged with the value of the services rendered by Mr. Courtney in defending the prisoner, but this court said: "We can not suppose that the Legislature intended that a necessary, and in many cases indispensable, part of the expense of a criminal trial coming from one county to another, should be borne by the county to which the change was taken."

It seems from these, and other authorities, that in this State the law regards the appointment of counsel to defend persons charged with grave crimes, who are too poor to employ counsel on their own behalf, as indispensably necessary to the orderly administration of justice and a fair trial.

Where a prisoner, without legal knowledge, is confined in jail, absent from his friends, without the aid of legal advice or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel. His defence may be ever so complete, if properly presented, and yet, if he escapes conviction under the circumstances above given, it must be for want of evidence on the part of the State. Such a trial is not far removed from an *ex parte* proceeding.

Under the showing in this case we think the court erred in refusing to permit the appellant to defend as a poor person, and in not assigning counsel for his defence.

It appears by the record that, after the jury had been sworn to answer questions as to their competency, Mr. Vail, a young attorney at the bar of the court in which the appellant was convicted, volunteered his services to defend the prisoner, and, over the objection of the appellant, was permitted, by the court, to question the jury, cross-examine witnesses, make a statement of the defence to the jury, call and examine witnesses for the defence, and argue the case to the jury.

It is claimed by the appellee that this cured the error of the court in refusing to assign counsel, if there was any error, and for this reason the judgment should not be reversed.

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No doubt Mr. Vail was prompted by commendable motives in thus volunteering his services to aid the prisoner in his extreme peril, but his motives were misunderstood by the appellant, and it appears that he refused to accept such services, and refused to communicate with Mr. Vail in relation to his defence.

Under these circumstances we can not suppose that the appellant had that full and fair investigation of his case which its importance demanded, and which the law contemplates. We do not think the fact that Mr. Vail volunteered his services at the time he did, and defended the prisoner to the best of his ability under the circumstances, surrounded by the embarrassments which beset him, cured the error of the court above indicated.

Judgment reversed, with directions to the circuit court to sustain the appellant's motion for a new trial.

OLDS, J., took no part in the decision of this cause.

Filed Feb. 2, 1892.

No. 13,628.

WYSOR ET AL. v. JOHNSON ET AL.

BILL OF EXCEPTIONS.—*Delay of Judge in Signing.—Effect.*—If time is given for filing a bill of exceptions, and within that time a proper bill is prepared and presented to the judge, and the fact of presentation is shown by the recitals of the bill, delay of the judge in signing it will not prejudice the party presenting it; for it may be signed and filed after the expiration of the time allowed.

SAME.—*Presentation of Part of Bill Before and Part After Time Allowed.*—If part of a bill of exceptions is presented within the time allowed and part after that time, no part of the bill will be considered on appeal.

SAME.—*Filing within Term Time.—No Time Given.*—If a bill of exceptions is signed and filed during the term at which the ruling it contains was made, it is a part of the record, although no time was given within which to file it.

130	270
143	686
130	270
150	215
130	270
168	432

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SAME.—*Ruling After Time Given.*—Time given within which to file a bill of exceptions can not be construed as applying to a ruling thereafter made.

From the Delaware Circuit Court.

W. Brotherton and W. W. Orr, for appellants.

J. N. Temple and J. F. Sanders, for appellees.

McBRIDE, J.—The first three errors assigned in this case relate to rulings of the circuit court in overruling demurrers to pleadings. Having carefully read the pleadings thus questioned, we deem it unnecessary to devote time or space to any extended consideration of the alleged errors. They are, in our opinion, clearly and unmistakably good. Indeed, the manner in which the questions were presented to this court is practically a waiver of error, if there had been any, and we have only examined the pleadings with a view to satisfying ourselves whether or not there is merit in the appeal.

The only remaining error assigned is that the court erred in overruling a motion for a new trial. The record shows the return of the verdict of the jury December 23, 1885. A motion for a new trial was filed the next day. December 30th the court made an order giving sixty days' time within which to perfect and file bills of exception. On the same day the appellant filed a bill of exceptions relating to a matter not involved in this appeal. The motion for a new trial was overruled February 19, 1886, and judgment was rendered against the appellants. They excepted and prayed an appeal to this court, which was granted, but no time was asked or granted for filing a bill of exceptions. On the 16th day of February, 1887, that which purports to be a bill of exceptions containing the evidence and instructions to the jury was filed. This was only three days less than a year after the motion for a new trial was overruled and judgment rendered. The bill of exceptions contains the following:

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"All that part of this bill of exceptions designated as follows, to wit, commencing with page No. 0 of the long-hand manuscript of the evidence, to page No. 288 thereof inclusive, and including the instructions to the jury given by the court, and the refusal of the court to give certain instructions asked by the defendants, and their exceptions thereto, was presented to the judge of this court on the 27th of February, 1886, and was so endorsed, as thereon appears; that said bill, as then presented and endorsed, was left with the official short-hand reporter, and was not again seen by or presented to the judge of this court until the 16th of February, 1887, at which time all that part of the foregoing bill following page No. 288 to and including page No. 822 has been since attached thereto, and said bill, in the manner and form as above stated, is now, on the 16th day of February, 1887, signed and allowed as the bill of exceptions in this cause.

ORLANDO J. LOTZ,

"Judge Delaware Circuit Court."

If time is given for filing a bill of exceptions, and within that time a proper bill is prepared and presented to the judge, and that fact is shown by the recitals of the bill, delay of the judge in signing it will not prejudice the party presenting it. It may be signed and filed after the expiration of the time. *Robinson v. Anderson*, 106 Ind. 152; *Vincennes, etc., Co. v. White*, 124 Ind. 376; *Joseph v. Mather*, 110 Ind. 114; *City of Plymouth v. Fields*, 125 Ind. 323; *White v. Gregory*, 126 Ind. 95, and many other cases.

This requires, however, that the party actually present a bill of exceptions, and not as in this case a mere fragment of a bill. The rule above stated is based on section 629, R. S. 1881, and the language of the statute requires that the party "must within such time as may be allowed, present to the judge a proper bill of exceptions."

The recitals of the bill before us show that 534 of its 822 pages were never presented to nor seen by the judge until nearly a year after he had ruled on the motion. This is of

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itself sufficient to prevent the consideration of any question sought to be presented by the bill of exceptions.

There is, however, still another reason why the bill can not be regarded as part of the record. As above stated, when the motion for a new trial was overruled, while the parties excepted, no time was given for filing a bill of exceptions. The presentation of the partial bill on the 27th day of February was within the term. If, notwithstanding no time is asked or given for filing a bill of exceptions, a proper bill is actually *signed and filed* during the term of court at which the ruling is made, this is sufficient. *Noblesville Gas, etc., Co. v. Teter*, 1 Ind. App. 322, and authorities cited. It will be presumed that time was given by parol, and that the bill was presented within the time allowed. The statute above cited has no application when no time has been allowed. The order of December 30, 1885, giving sixty days' time for filing bills of exception can not be construed as applying to an exception to a ruling which was not made until February 19th thereafter.

Judgment affirmed with costs.

Filed Feb. 6, 1892.

No. 15,511.

LAMB v. LAMB.

HUSBAND AND WIFE.—*Antenuptial Contract Procured by the Husband's Fraud.*—*Setting Aside.*—*Husband's Subsequent Conduct.*—An antenuptial agreement which the intended husband by fraud and misrepresentations procures from his intended wife may be set aside at her instance before the marriage is dissolved or he dies; and his misconduct after marriage toward her may be shown for the purpose of showing that her act in bringing the suit was not premature.

From the Floyd Circuit Court.

C. L. Jewett and H. E. Jewett, for appellant.

D. C. Anthony, for appellee.

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ELLIOTT, C. J.—The appellant alleges, in her complaint, that she and the appellee entered into a contract of marriage; that the appellee obtained a controlling influence over her, and secured her confidence; that, well knowing the influence he possessed over her, the appellee falsely represented to her “that, in order to satisfy his grown up sons of the propriety of his marriage to her, and to reconcile them thereto and enable him and her to live in peace after their marriage, it would be necessary for them to execute a paper which would satisfy the defendant’s children, but that the paper would not have the effect to deprive her of any of her rights as his wife or as his widow;” that, “notwithstanding such paper to be so executed by them, she would receive more than twenty-three thousand dollars in stocks, moneys and bonds;” that, “in furtherance of his fraudulent design, the defendant represented to the plaintiff that he would take her to a good lawyer in New Albany, who would act for her and advise her in the matter; that the defendant thereby induced her to go to the office of his own attorney and legal adviser, where, in the presence of the defendant, plaintiff was assured that the paper was all right and as represented by the defendant; that relying upon such representations, and not knowing or understanding the legal effect of the paper, but believing that it was only intended to satisfy defendant’s children, and without any intention to relinquish her rights, the plaintiff, in ignorance, not only of the legal effect of such paper, but also of the contents thereof, joined the defendant in the execution, in duplicate, of a written instrument,” which reads thus: “This agreement, made this 21st day of August, 1884, between Josiah Lamb of the first part, and Jane Lamb of the second, witnesseth, that, whereas, marriage is intended to be had between the parties, and, whereas, the party of the first part is the owner of large real and personal estate, and to the end that distribution of his said estate may now be settled, so far as the party of the second part is concerned, should he die first: Now, there-

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fore, in consideration of the payment of the sum of one dollar by the party of the first part to the party of the second part, the receipt whereof is hereby acknowledged, and of the relinquishment by the party of the second part of all her rights, title and interest in and to the estate, real and personal, of the party of the first part allowed by law, the party of the first part hereby agrees to give and does give to the party of the second part to have and hold as her own separate property, absolutely, out of the estate of the party of the first part, should she survive him, the following personal property." The instrument concludes with a description of the personal property. The complaint, after setting forth the agreement we have copied, avers that the property described in the agreement was of the value of two hundred dollars, and that the value of the appellee's personal estate was more than forty thousand dollars; that the parties married and for a time lived and cohabited as husband and wife. The complaint contains many allegations concerning the appellee's conduct and behavior after marriage, but these we regard as at present immaterial, since the immediate question is whether the antenuptial contract is voidable upon the ground of fraud, and the appellee's conduct after marriage does not affect that question. We shall, however, consider the effect of the appellee's conduct subsequent to marriage at another place.

If the only fraud on the part of the appellee was in misrepresenting the legal effect of the written contract, there could be no recovery in this case unless the situation and relationship of the parties are such as to take the case out of the ordinary rule. It is established law that where parties deal at arms-length in respect to ordinary business matters, the false representation of the legal effect of a written instrument will not constitute fraud. But the rule that the false representation of the legal effect of a written instrument will not constitute actionable fraud does not, by any means, apply to all cases; on the contrary, there are very

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many cases over which it does not extend. *Townsend v. Cowles*, 31 Ala. 428; *Peter v. Wright*, 6 Ind. 183; *Kline v. Kline*, 57 Pa. St. 120; *Rockafellow v. Newcomb*, 57 Ill. 186. The question here is whether the rule extends over a case where parties occupy a relationship such as that which existed between the appellant and the appellee. We think it clear that it does not.

But there was here more than the misrepresentation of the legal effect of an instrument, there was deception, and undue advantage was taken of an ignorant woman by one who had obtained her confidence. There was deception in pretending to take the woman to an attorney who could act as her adviser and protect her interests as his client, but in fact taking her to the attorney of the defendant, who was under a duty to him, and could not be the confidential adviser of one whose interests were adverse to his. There was undue advantage taken in putting the woman off with property so grossly disproportionate in value to the estate of her intended husband, and in violating the duty the defendant was under to make no untruthful representations. We think it sufficient to quote the statements of authors of good standing, without collecting the cases, for we are satisfied that they correctly state the law. One of these statements is found under the head of "Confidential Relations," and is this: "Undue influence may easily be exercised under the intimate relation created by an engagement to marry. In the case, *e. g.*, of a marriage settlement of the intended wife's property, drawn up by the intended husband, it is the duty of the latter to explain the provisions of the deed in unmistakable terms, and to give due opportunity to the lady for deliberation; failing which she may on the husband's death, if not before, have the settlement annulled. Again, if a woman give a man land upon a promise of marriage, and he then refuse to marry her and continue to hold the land, this is a fraud for which the law will give the woman proper relief. So, on the other hand, if a man should, after much solicitation and hesitancy, convey land without

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adequate pecuniary consideration to a woman who had promised to marry him, and who had thereby gained great influence over him, her refusal to marry him would afford him ground for rescinding the conveyance." 1 Bigelow Fraud, 351. Another statement of the law is: "Owing, moreover, to the confidential relation which subsists between the parties, an antenuptial contract which appears to have been unfairly procured will be set aside." Schouler Domestic Relations, section 183.

The decision in the case of *McNutt v. McNutt*, 116 Ind. 545, does not control this case nor is it at all relevant except upon the single question of consideration. In that case no element of fraud on the part of the husband entered into the case as there considered and decided. Here, consideration is not a controlling element, but is a fact to be considered in connection with other facts upon the question of fraud.

We think that the appellant has a right to show the misconduct of the husband after marriage, not for the purpose of showing that the antenuptial contract was procured by fraud—upon that question it exerts no influence whatever—but for the purpose of showing that the act of the wife in bringing suit was not premature.

Judgment reversed.

Filed Feb. 6, 1892.

No. 15,196.

KUNZ ET AL. v. PUSTER ET AL.

WILL.—Construction.—Life-Estate to Wife and Fee to Son, Charged with Burden.—A testator gave to his wife his real and personal property "to keep and hold during the term of her natural life, and give her all rights and power to sell and convey as her property, that is if she will never get married again; and after my wife's death my real estate and personal property, together with all I own and possess, with all money

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due me, shall go over to my son," E., "and his heirs forever." He then gave to E., after his wife's death, all his personal property, money and choses in action, and required him to pay the testator's debts out of the personal property. Then followed a clause providing that at the wife's death the real estate should be appraised at its lowest cash value, and E. was required to pay two-thirds of the amount to the testator's three grandchildren when they arrived at the age of twenty-one years. The testator then adds, in explanation of the language he had used, as follows: "So this is understood that my son," E., "shall be the owner of my property, real and personal, and carry on my business, and out of my real estate he will pay the other parties above named their third part in money."

Held, that the wife took a life-estate in the real estate, and the son, E., took the fee charged with the payment of the two-thirds of its value to the grandchildren named.

From the Vanderburgh Circuit Court.

G. A. Bicknell, A. C. Tanner and W. W. Ireland, for appellants.

S. R. Hornbrook, A. Gilchrist and C. A. De Bruler, for appellees.

OLDS, J.—Henry Kunz died testate in January, 1885, domiciled in Dubois county, Indiana, and the owner in fee of real estate situated in Dubois and Vanderburgh counties. He left surviving him his widow, Mary Kunz, his son, Edward H. Kunz, and his grandchildren, Nora E. Reutepohler, Albert H. Kunz and Florence Kunz.

His will was duly probated in Dubois county in February, 1885. The widow, Mary Kunz, and the son, Edward H. Kunz, sold and conveyed the real estate described in the complaint, and situate in Vanderburgh county, to the appellees Puster and others, claiming to be the owners in fee of said real estate, and this action is brought by the grantees of Mary and Edward H. to have their title quieted.

The various rulings of the court on demurrers to the pleadings present the question of the proper construction to be given to the will of the testator; it being contended by the appellees, and so held by the court, that the will

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gave to the widow, Mary Kunz, the right to sell and convey, by title in fee simple, the real estate of which the testator died seized. In this holding we think the trial court committed an error. It will unnecessarily extend this opinion, and accomplish no good purpose, to set out a copy of the will, for certainly no other testator will frame a devise in the same language as this one, or so nearly the same that this will be any guide for the construction of another, except as it must be controlled and construed by well settled legal principles.

In one clause of the will the testator first gives to his wife all his real estate and personal property, particularizing to some extent, and adding the words, "to keep and hold during the term of her natural life, and give her all rights and power to sell and convey as her property, that is if she will never get married again. And after my wife's death my real estate and personal property, together with all I own and possess, with all money due to me, shall go over to my son, Edward Henry Kunz, and his heirs forever." He then gives to his son, after his wife's death, all his personal property, money and choses in action, and requires the son to pay all of his debts out of his personal property. Then follows a provision that the real estate shall be appraised after his wife's death by three disinterested men, at its lowest cash value, and the same divided into three equal parts, requiring his son, Edward Henry, to pay one-third to Nora Reutepohler and one-third to Albert Henry and Florence Kunz, grandchildren of the testator, when they arrived at the age of twenty-one years.

Immediately following this disposition of the property, and in explanation thereof, this language is used: "So this is understood that my son, Edward Henry Kunz, shall be the owner of my property, real and personal, and carry on my business, and out of my real estate he will pay the other parties above named their third part in money."

The rule that in the construction of a will such as the one

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under consideration, consisting of but one item, all of the instrument shall be considered together, is too well-settled to require the citation of authorities. Applying this well settled rule to the construction of this will, it would seem to us that there could be no doubt as to what was the intention of the testator in relation to the real estate disposed of by the will. While it is true, after giving to his wife a life-estate, he adds a clause giving her the right to sell provided she shall never marry again ; yet, immediately following, he gives all of his real estate and personal property to his son, and makes provision for him to pay his debts out of his personal property, and conduct his business, and provides for the appraisement of all of his real estate after his wife's death, and that the son shall pay to his grandchildren two-thirds of its appraised value. After he has made these provisions, that he may not be misunderstood, he places a construction on the former words, and says : " So, this is understood, that my son, Edward Henry Kunz, shall be the owner of my property, real and personal."

The wife took a life-estate in the real estate, and the son, Edward H., took the fee, charged with the payment of the two-thirds of its value to the grandchildren named.

Counsel for appellee place great stress on the clause of the will making the devise to the wife, and say : " Here the rule is applicable that regard shall be paid to the predominant idea of a will, and a general or predominant intention must prevail over a particular or subsidiary one." If there is any predominant idea expressed in this will, it is the intention to give to his son his real estate, and to require him to pay the grandchildren the two-thirds value of the same. It is further said by counsel that " It is also a rule of controlling authority that the power of disposition can not be taken away by any subsequent words, unless they are equally clear." The latter words in this will are equally clear and explicit as those giving the right to the widow to sell. The right given to sell does not purport to be more than a

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conditional right, though the condition may be void. The disposition of the property afterwards made is clear and explicit, depending on no conditions.

The right of disposition by the wife under the will certainly can not be held to apply to the real estate, even if it does to the personal property. *Giles v. Little*, 104 U. S. 291; *Lindsey v. Lindsey*, 45 Ind. 552; *Eubank v. Smiley*, *post*, p. 393.

Reaching the conclusion that we do, that the wife took but a life-estate in the lands, without power of disposition, and that the fee vested in the son, Edward Henry, charged with the payment of two-thirds of its appraised value to the persons named, leads to a reversal of the judgment.

Judgment reversed, at costs of appellees, with instructions to the court below to proceed in accordance with this opinion.

Filed Feb. 3, 1892.

No. 15,493.

FUGATE v. PAYNE.

130	281
149	423

DESCENT.—*Widow During Second Marriage Conveying to Her Child with Assent of Her Remaining Children.*—A widow who marries a second time may, during such marriage, convey real estate, which she holds by virtue of her former marriage, to one of her children by her first marriage, if her other children by such marriage join in the deed of conveyance.

From the Morgan Circuit Court.

G. A. Adams and J. S. Newby, for appellant.

J. H. Jordan and O. Matthews, for appellee.

ELLIOTT, C. J.—Jeptha Hogland died in the year 1866, leaving two children, Alice and Belle, and his widow, the appellant, surviving him. The land in controversy was

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owned by the decedent at the time of his death, and was assigned to the appellant by a decree rendered in a suit for partition. Subsequently the appellant married Edward G. Fugate. On the 20th day of September, 1880, she and her husband, Edward G. Fugate, executed to Frank Jackson, the husband of the appellant's daughter Belle, a deed for the land. In this deed her daughter Alice also joined. Jackson paid five hundred dollars for the land, all of which was received by the appellant. Jackson took possession and made improvements. On the 1st day of August, 1888, Jackson and his wife conveyed the land by warranty deed to the appellee.

We think it clear that the appellant divested herself of title to the land. One of the two surviving children of her first husband joined with her in the deed to the husband of the other child, and the other joined with her husband in the conveyance of the land to the appellee. The appellant received the whole consideration, and still retains it. Her children, the owners of the fee, fully acquiesced in the conveyance, and it would be unjust to permit her to deprive her grantee of the property she sold him, and for which she received full payment. The statute was meant to prevent the injustice which the appellant seeks to inflict upon her grantee. Section 2484, R. S. 1881.

Judgment affirmed.

Filed Jan. 30, 1892.

 No. 15,448.

RATLIFF v. STRETCH ET AL.

COURTS.—Inherent Power to Grant Relief.—A court of general jurisdiction has inherent power to grant equitable relief without the aid of a statute empowering it to act.

JUDGMENT.—Enjoining.—Laches.—Relief Available in Original Action.—Mistake, Fraud or Accident.—A court of equity will not enjoin the enforcement of a judgment claimed to have been obtained by fraud, mistake

130	282
132	507
130	282
138	370
130	282
144	43

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or accident, unless the complaint shows, in addition to the fraud, accident or mistake relied upon, that it could not have been prevented by the use of reasonable diligence on the part of the plaintiff, that he has been diligent in seeking relief, and that the law afforded him no efficient remedy for the maintenance of his defence in the action in which such judgment was rendered.

From the Grant Circuit Court.

G. W. Steele and *J. A. Kersey*, for appellant.

W. H. Carroll and *G. D. Dean*, for appellees.

MILLER, J.—The action of the court in sustaining a demurrer to the complaint is the only question contained in the record.

The action is to enjoin the enforcement of a judgment for the partition of real estate, and the prosecution of an action for the recovery of rents.

A synopsis of so much of the complaint as is deemed necessary to an understanding of the questions of law involved is as follows:

Plaintiff complains of defendants, and says that the plaintiff is the owner in fee simple of a tract of real estate, which is described; that in 1868 he recovered a judgment in the Grant Circuit Court against said Jane A. Stretch and others quieting his title to the real estate; that since that time she has never acquired or had any right or title thereto or interest therein; that by a mistake and inadvertence on the part of the clerk of the court who recorded the judgment the description of the land was omitted from the decree; that plaintiff did not know of the mistake and omission until the year 1886, and when he learned of the same the complaint in the cause was not on file in the office of the clerk of said court, and upon a diligent search could not be found; that the complaint in said cause contained an accurate description of the real estate; that since the April term, 1889, of the Grant Circuit Court, the plaintiff has found the complaint, and has commenced proceedings to procure the amendment and correction of the decree by having inserted

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therein the description of the real estate as contained in the complaint.

That in the year 1886 said Jane A. Stretch recovered a judgment against the plaintiff in said court for the partition of said real estate, and on the trial of the cause plaintiff put in evidence the record of his judgment quieting his title against her, and then for the first time learned that said judgment and decree did not contain a description of the real estate; that the complaint containing the description was lost and could not be found; that if said decree had contained said description, or if said complaint could have been found, it would have been given in evidence, and said Jane A. Stretch could not and would not have recovered her judgment in partition against him; but that in said action she did obtain a decree in partition for the one-seventh of said real estate; that as soon as the plaintiff found said complaint he commenced his proceedings to correct the record of said judgment; that when the record is corrected it will show that said Jane has no right or title to, or interest in, said real estate, and never had any; that there was no paper or memorandum other than the complaint by which the judgment quieting title could have been amended.

The complaint shows that the land in dispute was about to be sold by a commissioner appointed in the partition suit.

It is also alleged that said Jane A. Stretch had commenced an action against the plaintiff, which was pending, for the recovery of rents on the one-seventh interest in the land which had been set off to her.

That the plaintiff is now able to prove by his said judgment quieting title, and the complaint filed by him in that suit, that when said Jane A. Stretch recovered her judgment in partition, she had no right or title to, or interest in, said real estate, which fact he was unable to prove on the trial by said unavoidable accident and mistake.

The power of courts of general jurisdiction to grant equitable relief is not only conferred by our code of practice, but

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has often been recognized as among their inherent powers, necessary to the complete administration of justice. *Nealis v. Dicks*, 72 Ind. 374; *Sanders v. State*, 85 Ind. 318; *Curtis v. Gooding*, 99 Ind. 45; *Little v. State*, 90 Ind. 338; *Brown v. Goble*, 97 Ind. 86.

The liberal provisions of our code, by which both legal and equitable defences may be interposed on a trial, and new trials granted for misconduct of the jury, or prevailing party, or on account of accident or surprise, have, by affording an equally efficient and more expeditious method of affording relief, greatly abridged the province of equity in granting relief by injunction.

On this subject Pomeroy Eq. Jur., section 1365, contains this language: "The jurisdiction of the English chancery to enjoin judgments at law, not by reason of any equitable right involved in the controversy itself, but on account of wrongful acts or omissions accompanying the *trial* at law, originated at a time when the law courts had little or no power to grant new trials for such causes. To prevent a failure of justice, a distinct head of equitable jurisdiction was admitted, that of virtually granting new trials—of entertaining suits for a new trial—when a judgment at law had been thus obtained by fraud, mistake, or accident; and the injunction against further proceedings on the judgment was a mere incident of the broader relief which set aside the judgment, and granted a rehearing of the controversy in the court of chancery. The original occasion for this special jurisdiction has disappeared. In England, and in most, if not all, of the American States, either through statutes or through judicial action, the courts of law have acquired, and constantly exercise, full powers to grant new trials, whenever from the wrongful acts or omissions of the successful party, or from accident or the mistake of the other party, or from error or misconduct of the judge or the jury, there has been a failure of justice."

In order to justify a court in enjoining the enforcement of a judgment claimed to have been obtained by fraud, mis-

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take or accident, it is necessary for the complainant to show, in addition to the fraud or mistake relied upon, that it could not have been prevented by the use of reasonable diligence on his part; and that he has been diligent in seeking relief, and that the law afforded him no efficient remedy for the maintenance of his defence in the action in which such judgment was rendered. *Pomeroy Eq. Jur.*, section 1361.

Viewed in the light of these authorities, the complaint does not state such facts as will entitle the appellant to enjoin the enforcement of the judgment rendered against him.

We do not consider the allegation in the complaint that the plaintiff is the owner of the real estate, when taken in connection with the fact disclosed in the pleading that she had obtained a judgment against him for an undivided one-seventh of the property, as of controlling importance. We regard the allegation simply as the assertion of the plaintiff; a claim of ownership, which could not control the legal effect of the judgment.

Waiving a discussion of the question of negligence on the part of the plaintiff in failing, either in person or by attorney, to supervise the making of the entry of the decree quieting title, we are of the opinion that his conduct subsequent to the discovery of the defect in the judgment has been of such a character, and pursued for such a length of time, as to constitute a waiver on his part of the right to appeal to equity to correct the judgment and enforce it against her.

If at the trial the appellant, as was doubtless the case, was surprised at the defect in his judgment, and the loss of the complaint, he might have asked for time to substitute the complaint under the provisions of the act providing for the reinstatement of records. *Section 1239, R. S. 1881.* His equity to have a continuance for such purpose was quite as strong as it now is to ask an injunction, and much superior in point of time.

If his application for a continuance had been made and

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refused, it could have been assigned as a cause for a new trial, and if necessary reviewed on appeal to this court.

It was not essential that the appellant should have a correction of the decree in order to have the benefit of its use on the trial. In that case, on appeal to this court, it was said (*Ratliff v. Stretch*, 117 Ind. 526): "The appellant also introduced in evidence a decree of the Grant Circuit Court in his favor against the appellee and James A. Stretch, quieting title, but no land is described in this decree. The complaint upon which it was based might have supplied this defect, but it was not read in evidence. A decree quieting title to land, unless the description can be ascertained from the record, is void."

If the appellant, in his choice of remedies, thought best to rely upon his legal rights, and to appeal from the judgment rather than make application for a continuance on the ground of surprise, we think he must, after the length of time that has elapsed, stand by his election.

The cases cited by the appellant do not, upon examination, render him much assistance in the position he is compelled to assume in this case. In *Brown v. Goble*, *supra*, the judgment, although it appeared to be valid, was in fact void. *Vathir v. Zane*, 6 Grat. 246, the only case cited, where the enforcement of a judgment was enjoined because an instrument of writing which was necessary to the maintenance of the plaintiff's case was lost at the time of the trial, was decided in 1849 in a State where courts of equity existed and retained jurisdiction separate and apart from the common law courts.

We are satisfied that it would inaugurate an unsafe practice, and one well calculated to produce instability in judgments, and uncertainty in titles, if judgments could be set aside and their enforcement enjoined, because one of the parties litigant, on account of the absence of a witness, or loss of an instrument in writing, did not have sufficient evidence

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to maintain their case. In *Fletcher v. Warren*, 18 Vern. 45, the court said, on this subject:

“ Mere accident or mistake on his own part is rather to be accounted his misfortune than imputed as a wrong to the other party; and it must be a strong case where this alone can be made the ground of equitable interference at so late a stage.”

Another view may be taken of the case: If the appellant was, as alleged, the owner of the property, he might have been able, for anything that appears to the contrary in the complaint, to have established that fact on the trial without resorting to the record of the previous action to quiet title. If such was the case the record evidence, while of a high grade and conclusive nature, was merely cumulative.

We are of the opinion that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed Feb. 5, 1892.

 No. 15,550.

BACKER v. PYNE ET AL.

130	288
150	477
180	288
154	198

FRAUD.—*False Representations as to Fact in Public Record.—Relying Upon.*

—A false representation made for a fraudulent purpose may be relied upon by the person to whom it is made, although the representation is of a fact contained in a public record.

SAME.—*Notice of Facts in Public Record.—Duty to Take.*—Persons are bound, in the absence of fraud, to take notice of the facts exhibited in a public record.

SUBROGATION.—*Fraudulent Representations of Debtors.—Money Advanced to Pay off Liens and Redeem from Sale.*—If a debtor, by fraudulent representations, induces a person to advance money to pay off liens, redeem the debtor's property from sale, and to release his own judgment, which is a lien on such property, such person will be subrogated, as against such debtor, to the rights of the persons whose liens his money went to pay.

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SAME.—Volunteer.—Who is Not.—A person who advances money to pay off liens and protect his own interests is not a volunteer.

SAME.—Keeping Lien Alive.—A lien will be kept alive where equity requires it and the parties intended that it should not be extinguished.

SAME.—Subsequent Lien Holder.—When Subrogated to Lien Prior to Lien of Third Person.—Money paid by a mortgagee, to remove prior liens, under the belief, induced by fraudulent representations of the mortgagor, that his mortgage would become the senior lien, is entitled to be subrogated to the liens he has thus paid off as against a person who knew nothing of such representations, and whose lien is prior to the mortgage lien and junior to the liens satisfied.

REDEMPTION.—Day for Failing on Sunday.—Where the last day of the redemption year falls on Sunday, the land may be redeemed on the following Monday.

SAME.—Computation of Time.—In computing the time within which a redemption from a sheriff's sale may be made, the day of sale must be excluded.

From the Perry Circuit Court.

W. Henning, A. Gilchrist and C. A. De Bruler, for appellant.

C. H. Mason and S. K. Connor, for appellees.

ELLIOTT, C. J.—The complaint of the appellee states these material facts: On the 12th day of May, 1888, the appellee recovered judgment against John B. Friedl for thirteen hundred and seven dollars. At the time the judgment was recovered there were several other judgments against Friedl prior to that recovered by the appellee. One of the prior judgments was in favor of John Richardt. On this judgment an execution was issued, and the real estate in controversy sold. John T. Patrick bought the land from the purchaser at the sale and received a certificate from the sheriff. On the 22d day of June, 1888, Friedl asked the appellee to assist him in paying the lien acquired by Patrick, and falsely and fraudulently represented to him that his judgment and the lien of Patrick were the only liens on the land, except a judgment in favor of Sarah Cooper and one in favor of Joshua H. Grover. The appellee consented to

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advance the money required to redeem the land from the sale made to Patrick on the Richardt judgment, and Friedl agreed to execute a mortgage to secure the appellee. The money was advanced and the mortgage executed. The land was redeemed from the sale made to Patrick on the Richardt judgment, and Friedl received from the clerk a certificate of redemption. Relying upon the representations of Friedl, the appellee entered satisfaction of the judgment in his favor against Friedl. He received no consideration for such entry of satisfaction except the promise, and the mortgage executed by his debtor. After the entry of satisfaction the appellee learned that the appellant held an unsatisfied judgment against Friedl, amounting to fifteen hundred dollars. The appellant claims that he is the holder of a deed from the sheriff executed pursuant to a sale made upon his judgment, and that his rights and interests are paramount to those of the appellee. On the 10th day of June, 1889, the redemption was made from the sale to Patrick, that day of the week being Monday. The judgment on which the sale to Patrick was made was rendered on the 3d day of May, 1887; the Beilefield judgment was rendered on the 13th day of the same month; the appellant's judgment was rendered on the 8th day of July, 1887, and the appellee's judgment was rendered on the 12th day of May, 1888.

It appears from our synopsis of the complaint that the lien of the Richardt judgment is the paramount one, and the sale to Patrick the senior sale, so that if the appellee succeeded to the rights of Patrick he has a senior lien; and if he has such a lien the rights of the appellant ought, in equity and good conscience, to yield to his senior lien. If the equities of the appellee are strong enough to entitle him to subrogation as against the appellant, equity will decree subrogation, and remove all obstacles to its effective operation.

If the question were confined to Friedl, the judgment debtor, and the appellee, the case would be entirely free from difficulty. There can be no doubt that the representations

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of Friedl were fraudulent, nor can there be any doubt that the appellee had a right to rely on them. It is established law that a false representation made for a fraudulent purpose may be relied upon by the party to whom it is made, although the representation is of a fact contained in a public record. *Campbell v. Frankem*, 65 Ind. 591; *Dodge v. Pope*, 93 Ind. 480 (486); *Ledbetter v. Davis*, 121 Ind. 119; *Fisher v. Tuller*, 122 Ind. 31 (34); *Bristol v. Braidwood*, 28 Mich. 191.

If the appellee and the judgment debtor were here the only litigants, we should not have the slightest hesitation in adjudging that as the false representations of the debtor induced the appellee to advance the money, pay the liens, redeem the property and satisfy his own judgment, the latter is entitled to subrogation to the rights of the persons whose liens his money went to pay. *Shattuck v. Cox*, 128 Ind. 293; *Lowrey v. Byers*, 80 Ind. 443. What fraud creates, equity will destroy; and as the fraud of the debtor is the only obstacle that bars the appellee's way to a complete right under his mortgage equity would destroy that obstacle, if the author of the fraud were the only person interested. But the appellant is an interested party, and he is not connected with the fraud of the judgment debtor. It is because his interests are involved, and not because those of the debtor are affected, that the case is one of some difficulty.

The appellant possessed rights under his judgment, and of those rights the appellee was chargeable with notice. Parties are bound, in the absence of fraud, to take notice of the facts exhibited in a public record. *Taylor v. Morgan*, 86 Ind. 295; *Caley v. Morgan*, 114 Ind. 350. We must, therefore, consider and decide this case upon the theory that the appellee had notice of the rights of the appellant, in so far as they were disclosed by the record.

The rights of the appellant under his judgment were subordinate to those of the holder of the Patrick claim, so that

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if the appellee is subrogated to the rights of Patrick, he necessarily possesses the senior right. We think he is subrogated to those rights. He was in no sense a volunteer, for he had his own judgment, which gave him an interest he had a right to protect, and, moreover, he advanced money to pay off liens upon the faith of the debtor's representations. The money he advanced was used to pay off liens, and it was their payment that lets in the lien of the appellant, if it can come in at all. If the sale on the Richardt judgment had not been vacated, it would have completely cut off all junior liens. It is clear that there was a right to pay subsisting liens, that the appellee believed that he was protecting his own interests by paying them, and that there was no intention on his part to extinguish any prior lien, so as to let in junior liens such as that of the appellant. If the prior lien is not extinguished, it exists in some person; and that person must be the appellee, for he advanced the money which paid it, but he did not advance it to extinguish the lien. On the contrary, he advanced the money with the intention of protecting an interest that he had a right to protect, and his equities are superior to those of the appellant. He does not displace or crowd out the lien of the appellant, for he can only secure the senior lien by his right of subrogation to the lien of Patrick, which is the paramount one. His own judgment does not mount above that of the appellant. It is a familiar principle of equity jurisprudence that a lien will be kept alive where equity requires it, and the parties intended that it should not be extinguished. *Troost v. Davis*, 31 Ind. 34; *Hanlon v. Doherty*, 109 Ind. 37; *Strohm v. Good*, 113 Ind. 93; *Elston v. Castor*, 101 Ind. 426 (51 Am. Rep. 751); *Hewitt v. Powers*, 84 Ind. 295; *Smith v. Ostermeyer*, 68 Ind. 432; *Howe v. Woodruff*, 12 Ind. 214.

The doctrine of subrogation is applicable here, notwithstanding the fact that the rights of a third person have intervened. Here the third person has in no respect changed position; he has done nothing upon the faith of the acts

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performed by the party who invokes the doctrine of subrogation. He holds the same debt and the same security that he held before the appellee acted in the matter. His claim is that he occupies a better position than he would have done had there been no redemption from the Patrick sale. He asks to profit by the acts of another who believed that he was protecting his own interests and preventing the sacrifice of property by advancing money to his embarrassed debtor. Clearly, the right of subrogation existed as against the debtor, and the position of the appellant, although he is a third person, is not such as to defeat the right. *Payne v. Hathaway*, 3 Vt. 212. The money was paid by the appellee under the belief that his mortgage became the senior lien, and he is entitled to seize whatever liens he paid that will protect him from the claims of persons whose liens are junior to those he paid. *Sidener v. Pavey*, 77 Ind. 241; *Johnson v. Barrett*, 117 Ind. 551; *Morrow v. United States, et al., Co.*, 96 Ind. 21; *Bodkin v. Merit*, 102 Ind. 293; *Weiss v. Guérineau*, 109 Ind. 438; *Cockrum v. West*, 122 Ind. 372; *Erwin v. Acker*, 126 Ind. 133. The appellee did not, therefore, redeem simply as a judgment creditor or mortgagee, but in the capacity of owner; for the advancement of the money to the owner for that specific purpose, and the use of it for that purpose by him, entitle the appellee to full subrogation to his rights. But, having redeemed, all his rights as a lien-holder attach, and may be enforced. The redemption, it is true, was directly made by the judgment debtor, but it was made with the money advanced to him by the appellee for that purpose, and one of the principal reasons for advancing the money was to give seniority to the appellee's mortgage, so that the redemption enured to the benefit of the appellee. The authorities to which we have referred sustain this conclusion, and it is sustained by other decisions. It is sustained by the cases which hold that where money is loaned to an infant, and he uses it in buying necessities, the lender is subrogated to the rights of the

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seller of these articles. *Price v. Sanders*, 60 Ind. 310; *Conn v. Coburn*, 7 N. H. 368. It is sustained by the cases which hold that where a party is compelled to pay a bond executed by an officer, he is subrogated to the rights of the state or nation to whom the bond was executed. *Hunter v. United States*, 5 Pet. 173; *Robertson v. Trigg*, 32 Gratt. 76. It is sustained by the many cases which hold that where one pays off a senior mortgage upon a representation of the mortgagor that it is the only lien on the land, he is entitled to subrogation to the rights of the mortgagee. *Sidener v. Pavey*, *supra*, and authorities cited.

The complaint states facts entitling the plaintiff to some relief, and such a complaint is good against a demurrer, so that we need not inquire whether it does or does not entitle the appellee to all the relief prayed. *Bayless v. Glenn*, 72 Ind. 5.

Counsel on both sides assume that the question as to the correctness of the ruling denying a new trial is before us, and we shall so treat it, although it very clearly appears from the assignment of errors that no such question is presented.

The only point that we need give attention in considering the ruling denying the motion for a new trial, is that made by appellant's counsel as to the rule for computing the time for redemption. Their contention is that as the sale was made on the 9th day of June, 1888, and the money was paid to the clerk and a right to redeem asserted on the 10th day of June, 1889, the attempt was ineffective. As the 9th day of June, 1889, fell on Sunday, the redemption was well made on the Monday following, provided a redemption on Sunday, the 9th, would have been effective. Where the last day for redemption is Sunday, it may be made on the next day. Section 1280, R. S. 1881; *Hogue v. McClintock*, 76 Ind. 205.

It is contended, however, that the year for redemption expired on the 8th day of June, 1889, and that a redemption on the 9th day of that month would not have been sufficient. We think it clear that the statutory rule for the computa-

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tion of time governs the case, and under that rule the day of the sale must be excluded. Our decisions have applied the rule to all cases affecting matters of statutory procedure. *State, ex rel., v. Thorn*, 28 Ind. 306; *Towell v. Holweg*, 81 Ind. 154; *English v. Dickey*, 128 Ind. 174. The decision in *Liggett v. Firestone*, 96 Ind. 260, was not directed to the question of the rule for the computation of time; the only question there decided was that the year for redemption did not begin to run until the payment of the bid by the purchaser at the sheriff's sale. What was there said is to be understood as addressed to the question there under investigation, and, thus understood, it does not affect the question here under consideration.

Judgment affirmed.

Filed Feb. 4, 1892.

No. 15,531.

HIRE v. KNISELEY ET AL.

HIGHWAY.—*Damages Reduced by Benefits Received by Opening.*—In estimating the damages which a land-owner will sustain by reason of establishing a highway over his land, the benefit he will receive must also be considered.

SAME.—*Pay for Fences Already Erected.*—If the proposed highway will not require any additional fences, but will only require those already constructed to be removed, the land-owner is not entitled to pay for such fences, but only for the cost of removing them.

SAME.—*Appropriation of Fences.*—There can be no appropriation of fences in the way of a proposed highway.

SAME.—*Damages.*—*Opinions of Witnesses.*—The opinions of witnesses tending to prove the market value of land, through which a proposed highway will run, without such highway, and its market value with the highway established and opened, may be given in evidence.

SAME.—*Opinion.*—*What is not.*—A question whether or not the opening of the highway will be a convenience to the land of the person asking damages, and to persons residing on it, so far as travel in a certain direction is concerned, does not call for an opinion, but for a fact.

130	295
134	264
130	295
164	436

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SAME.—*Opinion of Witness Whether Highway Would Affect Market Value of Land of Person Asking Damages.*—When a witness has testified that he is acquainted with the market value of land in the neighborhood of the proposed highway, and that such highway would affect the market value of the land over which it was to be located and opened, he may then give his opinion whether or not it would affect the market value of the land of the person asking damages.

From the Marshall Circuit Court.

O. M. Packard and C. P. Drummond, for appellant.

S. Parker, J. D. Chaplin and A. C. Capron, for appellees.

COFFEY, J.—The appellees filed a petition before the board of commissioners of Marshall county to lay out and establish a public highway. The appellant filed a remonstrance, in which he claimed damages on the ground that such proposed highway would run through his farm, and, if established, would greatly damage him. His claim for damages being denied before the board of commissioners, he appealed to the circuit court, where the cause was tried by a jury, resulting in a verdict and judgment in favor of the appellant for one dollar.

He appeals to this court, and assigns, as error, the ruling of the circuit court in denying him a new trial.

It is first insisted that the jury erred in its assessment of the appellant's damages, the amount assessed being too small.

It is insisted by the appellant that, under the evidence introduced by the appellees, he was entitled to recover at least ninety-two dollars and fifty cents damages, the same consisting of the value of the land taken for the highway, fencing the highway through his farm when opened, and removing existing fences; from which should be deducted the cost of constructing ditches on either side of the highway, which would drain the land.

If there was no other element to be considered in ascertaining the appellant's damages than those mentioned above, there would be much plausibility in this contention; but it

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is too firmly settled now to admit of dispute, that, in estimating the damages which one may sustain by reason of establishing a highway over his land, the benefit he will receive is also to be considered. *Yost v. Conroy*, 92 Ind. 464; *Watson v. Crowsore*, 93 Ind. 220; *Hagaman v. Moore*, 84 Ind. 496.

The appellant is in error in his claim that there is no evidence in the record to be considered in connection with the estimate above mentioned, for there is evidence from which the jury could have inferred, legitimately, that the benefits equaled the damages. From the evidence in the record, as it comes to us, we can not say that the jury erred in the assessment of the damages.

It is next contended that the court erred in giving to the jury the following instruction :

"The court instructs you, if you find from the evidence, taking into consideration all the facts and circumstances surrounding the case, that the construction of the proposed highway will necessitate the building of extra fence by the remonstrant, Lawson Hire, you may take the cost of the construction of such fence into consideration as an element of damages. But if you find that the remonstrator has now a line of fence, if any, on the line of the proposed highway, he is entitled in his assessment of his damages as to that line of fence to the cost only of removing the same on and to the line of said road, and not to the value of the material, if any, now on the line of said highway."

If we understand the position of counsel, as it is expressed in the brief, it is, that the appellant was entitled to the cost of a fence regardless of the fact that the fence was, by accident, near the line of the road, and that for this reason this instruction was erroneous, as was also the admission of evidence tending to prove the cost of removing the same.

The evidence shows that the proposed highway cuts through the appellant's farm from east to west, so as to leave a sixty-acre tract one hundred and twenty rods east

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and west by eighty rods north and south, to the north of the proposed highway. There is a fence, composed partly of rails and partly of wire, running the entire one hundred and twenty rods directly on the line of the proposed road. It will be necessary, when the road is opened, to maintain a fence on each side of it in order to utilize the farm. This instruction was given with reference to these facts, and we think announces the correct rule by which the appellant's damages, with reference to this fence, should be measured. By this rule the appellant would be fully compensated for his loss. The public does not appropriate the material of which the existing fence is composed, but appropriates an easement only over the land. The appropriation of this easement is one element of damages, and the removal of the fence is another. If the appellant is fully paid for taking down the fence and erecting it upon the line of the road, where a fence must necessarily be placed, what more can he claim? To pay him for the fence as it stands would be to pay him for that which the public does not appropriate, and he would then possess both its value and the property. It is true he could remove the fence, if he desired to do so, to some other place, but there is nothing to show that removing it to some other part of the farm was rendered necessary by the location of the highway, and the petitioners are not liable for the cost of such removal. As the location of the highway rendered it necessary to remove the fence from its present location and to rebuild it on the line of the road, those who brought about this necessity are liable for the cost of such removal and rebuilding, and nothing more.

Some evidence, of an objectionable character, consisting of the opinions of witness as to the difference in value of the appellant's farm with the proposed road and its value without it, was admitted, but this evidence, on motion of the appellant, was struck out. It is now urged that the language of the court in striking out this evidence was not sufficiently specific, but there was no effort on the part of the appellant

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to have it made more specific. It was sufficiently broad to include all the objectionable evidence, and no doubt the court would have made it as specific as desired had it been asked to do so.

The opinions of witnesses tending to prove the market value of the appellant's land without the highway, and its market value with the highway established and opened, was admissible, and should not have been struck out.

The case of *Hagaman v. Moore*, *supra*, which announces a contrary doctrine, was disapproved in the case of *Yost v. Conroy*, *supra*.

Finally, it is urged that the court erred in permitting a witness to answer the following questions :

" You may state if the opening of this road—Is the opening up of this road a convenience to Lawson Hire's land, so far as travel to the west is concerned,—to persons residing on Hire's land ? "

" Yes, sir, it is. "

" Would the opening up of this road make a difference in the market value of Lawson Hire's land ? "

" I think it would. "

The objection to each of these questions, stated to the court, was that it called for the opinion of the witness upon the question of benefits, and that it was for the jury to determine what benefits and damages would be occasioned by opening the proposed highway.

The witness testified that he was acquainted with the market value of land in the neighborhood of the appellant's farm.

Without regard to other objections that might be urged against these questions, it certainly can not be said of the first that it calls for an opinion as to the benefits and damages that will accrue to appellant's land by reason of opening the proposed highway. It relates to a question of fact, namely, as to whether the highway when opened will be con-

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venient to persons residing on the appellant's land, when they desire to travel west.

The second question does call for an opinion, but it is upon a preliminary matter. As to how the road affected the market value of the land, whether it increased or diminished its market value, does not appear. Having testified that he was acquainted with the market value of land in this neighborhood, and that the proposed highway affected the market value of the land over which it was to be located and opened, the witness had shown that he possessed such knowledge as would enable him to give an intelligent answer to one of the vital questions in the case—that is the market value of the land without the highway and its market value with the highway located and opened upon it.

We do not think the court erred in permitting the witness to answer these questions.

Judgment affirmed.

Filed Feb. 4, 1892.

130	300
132	196
133	313
130	300
146	442

No. 15,011.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v. BUCK.

EVIDENCE.—*Weight of Positive and Negative Testimony.—Instruction.*—It is not proper to instruct a jury they should give greater weight to a positive statement of a witness than to a negative statement of another witness.

INSTRUCTIONS.—*Refusol.—Record Must Show no Other Instruction Given on the Subject.*—In order to show error committed in refusing an instruction, the record must show that no other instruction was given on the subject of the one requested.

From the Knox Circuit Court.

W. H. De Wolf, E. H. De Wolf, W. M. Ramsey, L. Maxwell and R. Ramsey, for appellant.

W. A. Cullop, C. B. Kessinger, W. F. Townsend and J. Wilhelm, for appellee.

The Ohio and Mississippi Railway Company v. Buck.

OLDS, J.—This is an action for personal injuries sustained at a railway crossing in the city of Vincennes, in Knox county, Indiana. Issues were joined, and a trial had resulting in a verdict and judgment in favor of the appellee for \$4,000. Appellant filed a motion for new trial, which was overruled and exceptions reserved.

Errors are assigned, first, that the court erred in overruling appellant's motion to strike out parts of appellee's complaint, and, second, that the court erred in overruling appellant's motion for new trial.

The question of appellant's negligence, and of the appellee's contributory negligence, is discussed in detail and at length.

We have read the evidence, and have no doubt of the fact that there was evidence to support a finding that the appellant was negligent, and that the appellee was free from contributory negligence. That there may have been a preponderance of the evidence to the contrary, or that the jury might, upon some basis of reasoning, reached a different conclusion, can make no difference, for if there is evidence fairly tending to support the verdict it must stand. There was evidence to show that at the point of the injury the railroad track of the appellant crossed a street in the city of Vincennes; that there was a side-track south of the main track, from which direction appellee approached the crossing. There were a number of freight or box cars standing on the switch south of the main track, some on either side of the street, and they obstructed the view of the appellee as he approached the crossing.

There was a city ordinance prohibiting the running of trains at a speed in excess of five miles an hour, and prohibiting the sounding of the whistle. There was evidence tending to prove that the train which ran against the appellee was at the time running in excess of five miles an hour,—the evidence of some tending to show that the train was running at the rate of ten miles an hour,—and that employees in

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charge of it did not ring the bell or give any other signal. It is contended by counsel for appellant that this ordinance is invalid for certain reasons, but whether it is valid or not can make no difference, for, if not valid, the appellant was bound to give the statutory signals, and there was evidence from which the jury may have well found that such signals were not given. There was evidence fully justifying the jury in finding that appellant was guilty of negligence.

It is earnestly contended that the evidence fails to show that the appellee was not guilty of contributory negligence; that it appears that he did not use due caution in approaching the crossing and entering upon the track. The appellee testifies that he stopped his team and looked and listened for a train at a point which he fixes at sixty to eighty feet from the track. Other witnesses differ from him to some extent as to the distance from the railroad track when he stopped. He says he could not see or hear any train; that he immediately started on and continued to look to the right and to the left for a train, and to listen for one; that he did not see or hear an approaching train until his horses were going upon the main track and he passed the end of the freight car,—then he saw the train; that the quickest way off the track, and to avoid danger at that time, was to cross the track, which he attempted to do as quickly as possible, using the whip he held in his hand upon his horses; that when he first saw the train he thought it was thirty to sixty feet from him, and not near enough to strike him, but it did. He testifies that his hearing and eyesight are both good; he was driving in a two-horse wagon; that the freight cars standing upon the track obstructed his view, and prevented his seeing the approaching train.

Other witnesses testify that the cars standing on the track obstructed the view and prevented the seeing of an approaching train, and that no signals were given, and the train was running at more than five miles an hour.

There is some evidence contradicting some of the state-

The Ohio and Mississippi Railway Company v. Buck.

ments of the appellee and of his witness, and tending to show that at the point where appellee stopped to look and to listen his view was obstructed by a building, and that he might have seen the approaching train if he had stopped at another point, and that he could have heard it if he had listened.

There is also a difference in the testimony of the witnesses as to the space between the cars standing on the side-track where they separated at the street, and it is contended by appellant that the space was so great that if appellee had looked as he was approaching he could have seen past the end of the car along the main track, and have seen the approaching trains in time to have avoided a collision; but these facts, being disputed, were for the jury to determine from all the evidence, and having arrived at a conclusion, and there being evidence to sustain it, we can not set their verdict aside.

It is urged that the verdict is excessive. We do not think so. The evidence shows the injuries to be of a very substantial character, from which the appellee has suffered a great deal, and from which he has not recovered, and probably never will permanently recover. The damages assessed are not excessive.

It is contended that the court erred in overruling a motion to strike out parts of the complaint, and in giving and refusing certain instructions, but most of these alleged errors, however, are waived on account of a failure to discuss them. We have examined the instructions, and do not deem it necessary to set any of them out in the opinion. It is contended that the court erred in giving the third instruction, for the reason that it improperly defined the relative rights of railroads and travellers at highway crossings. This is not such a discussion of the alleged error as entitles the question to any consideration by the court. We have examined the instruction and do not regard it erroneous.

It is said that the fifth instruction is erroneous, for the reason that it tells the jury that the appellant must exercise a

"high degree of care." And that the court erred elsewhere in that paragraph of instruction in defining the measure of care required of defendant.

The instruction does state that the appellant, under the circumstances, was required in the running of its train to exercise a "high degree of care and diligence in doing so," but in the same instruction, and as explanatory of these words, the court tells the jury what amount of diligence and caution the appellant was required to exercise, giving a proper explanation as to what were the duties of the appellant in that behalf, and the jury were not misled by the words "high degree of care," even if the use of such words was technically erroneous.

There was no error in overruling appellant's motion to strike out parts of the complaint. The ordinance pleaded differs from the criminal statute of the State, and was properly pleaded.

We have examined the instructions offered by the appellant and refused by the court. There was no error in the refusal by the court to give them. For aught that appears, there may have been other like instructions given (*Stewart v. State*, 111 Ind. 554); but the instructions are erroneous, and were not proper to have been given.

The tenth instruction is to the effect that the jury should give greater weight to a positive statement of a witness than to a negative statement of another witness, is erroneous and was not proper to have been given. It may be true, in fact, that, under some circumstances, greater weight should be given to the positive statement of one witness than to the negative statement of another, but it depends upon the circumstances, and is not true as an abstract proposition of law, and is not a proper matter upon which to instruct a jury.

There is no error in the record.

Judgment affirmed, with costs.

Filed Feb. 6, 1892.

Boos v. Morgan et al.

No. 15,507.

BOOS v. MORGAN ET AL.

POWER OF ATTORNEY.—*When Must be Recorded.*—The statute requiring a power of attorney to be recorded does not apply to a power to assign judgments.

JUDGMENT.—*Purchaser of Encumbered land Paying.*—*Preserving Lien of.*—Where a purchaser of land pays off a judgment for which he is not liable, with a manifested intention to keep the lien alive, equity will preserve it for his protection and for equitable purposes.

SAME.—*Merger of Lien.*—Where the owner of land purchases a judgment which is a lien on the land, and takes an assignment of it, the lien is merged in the fee.

SAME.—*Purchaser of Property from Defendant Paying off Judgment.*—*Keeping Lien Alive.*—The doctrine of merger will not be applied as against a party not liable for a debt who pays it off to protect property acquired from the person primarily liable.

SAME.—*Merger.*—*Fraud.*—Merger is never prevented when fraud or wrong would result if it were defeated.

SAME.—*Levy.*—*Satisfaction.*—A levy is a satisfaction of the judgment to the extent of the value of the property levied upon.

SHERIFF'S SALE.—Land remaining in the possession of a debtor must be sold before resort can be had to land he has sold and upon which a judgment against him is a lien; and the purchaser, by a timely application to a court of equity, may compel the sheriff to first resort to the lands still retained by such debtor.

SAME.—*Bid by Judgment Plaintiff.*—*Paying Amount of Bid.*—Where a judgment plaintiff bids in the land sold, his receipt to the sheriff for the amount of his bid, when it does not exceed the amount due him on the execution, is a sufficient payment of such bid.

SAME.—*Sale on Satisfied Judgment.*—A sale on a satisfied judgment is void.

SAME.—*Notice of Irregularities.*—*Bona Fide Purchaser.*—A judgment plaintiff purchasing at his own sale is chargeable with notice of all irregularities. He is not a *bona fide* purchaser.

SAME.—*Extinguishment of Judgment by Sale.*—The sale of land and the payment of the bid, when it is sufficient to satisfy the amount due and costs, is an extinguishment of the judgment.

SAME.—*Irregular Sale.*—*Collateral Attack.*—A mere irregular sale can not be collaterally attacked.

From the Wabash Circuit Court.

B. F. Ibach, B. M. Cobb and C. W. Watkins, for appellant.

J. B. Kenner and U. S. Lesh, for appellees.

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131	228
131	457
131	554
130	305
140	206
130	305
146	111

Boos v. Morgan et al.

ELLIOTT, C. J.—The appellant alleges in his complaint that on the 15th day of April, 1876, Milton Hendrix recovered a judgment against the appellee Lucas for nine hundred and seventeen dollars, in the Huntington Circuit Court; that Lucas was then the owner of three parcels of land situate in Huntington county, and described in the complaint; that one of the parcels was of the value of four hundred dollars; that Lucas sold it to Henry Kemp; that the other parcel was of the value of twelve hundred dollars; that Lucas sold to the appellee Morgan the second of the parcels of land for one thousand dollars; that the third parcel of land was of the value of fifteen hundred dollars, and was sold to John Edgar; that the judgment in favor of Hendrix was a lien upon all of the several parcels of land. The complaint further alleges that, after Morgan purchased of Lucas the second parcel of land, Lucas became the owner of another parcel; that this last or fourth parcel was purchased from Lucas by the appellant; that the appellant paid the full value of the land, and received a warranty deed therefor; that at the time of his purchase of the fourth parcel of land from Lucas the appellant had no actual notice or knowledge of the existence of the Hendrix judgment; that Lucas was, at the time of the appellant's purchase, the owner of personal property of the value of two thousand dollars, and real property of the value of two thousand dollars; that all of this property was situated in Huntington county and subject to execution. It is also alleged in the complaint that Lucas became the owner of another parcel of land before the sale to the appellant; that the land of which he became the owner was sold by Lucas since the appellant became the owner of the fourth parcel of land; that on the 7th day of October, 1880, John Morgan paid the Hendrix judgment; that "Morgan attempted to take an assignment of the judgment, which attempt was made in the order book by one L. P. Milligan under and by virtue of a pretended power of attorney, which power of attorney was never recorded;" that on the 3d day

of April, 1880, Hendrix caused an execution to be issued on his judgment; that the sheriff levied the execution, but returned it without a sale, and a *venditioni exponas* was issued; that a sale was made of the lands on this last writ, and the lands purchased by Morgan; that he entered satisfaction on the record of the judgment assigned to him. It is still further alleged in the complaint that the appellant had no notice of the judgment or the proceedings thereunder until after the sale; that he then examined the records, and found that the judgment had been entered satisfied; that the writ on which the sale was made was issued with the entry of satisfaction uncanceled, and without any disposition of the property levied upon under the former writs, or any order vacating the first sale; that the appellant had no notice of the last sale until long after it was made.

The position first assumed by counsel is that the assignment of the judgment by Milligan, the attorney in fact of the original judgment creditor, was ineffective because the power of attorney was not recorded. There is no strength in this position. If, as the complaint tacitly concedes, Milligan was the attorney in fact of the judgment creditor, the assignment is not ineffective merely because the instrument investing the attorney with authority was not recorded. The statute requiring a power of attorney to be recorded does not apply to a power to assign judgments.

A more serious question than that disposed of arises on the contention that Morgan paid the judgment. The complaint avers that he did pay it, but it also shows that he took an assignment of it. We think it quite clear that if Morgan had extinguished the judgment by payment, he could not use it to the injury of the appellant, as the latter had a right in equity to have the other property of the judgment debtor first subjected to the payment of the judgment lien. As Morgan was not primarily liable for the judgment, and as he did take an assignment of the judgment, the conclusion required by the authorities is that he did not extinguish

the judgment. It is settled beyond controversy that where the purchaser of land pays off a judgment for which he is not liable, and there is an intention manifested to keep the lien alive, equity will preserve it for his protection and use for equitable purposes. *Troost v. Davis*, 31 Ind. 34; *Hanlon v. Doherty*, 109 Ind. 37; *Strohm v. Good*, 113 Ind. 93; *Elston v. Castor*, 101 Ind. 426 (51 Am. Rep. 754); *Hewett v. Powers*, 84 Ind. 295; *Lowrey v. Byers*, 80 Ind. 443; *Smith v. Ostermeyer*, 68 Ind. 432; *Howe v. Woodruff*, 12 Ind. 214; *Barnes v. Mott*, 64 N. Y. 397. We hold, upon this point, that the payment did not extinguish the lien of the judgment, but whether equity will suffer Morgan to use it to the injury of the appellant is quite another question. That question we will presently consider. All we do now is to adjudge that there was no complete or absolute extinguishment of the judgment. In holding this we necessarily affirm that the case is not within the rule that where one pays off a judgment for which he was primarily liable the judgment is extinguished.

The authorities to which we have referred conclusively answer the appellant's contention that, as Morgan was the owner of the fee, the lien of the judgment was merged when he acquired it by assignment. It is a settled principle of equity jurisprudence that the technical doctrine of merger can not be applied against a party not liable for a debt, who pays it off to protect property acquired from the person primarily liable. The intention and the situation of Morgan prevented a complete and absolute merger, and kept the lien of the judgment alive in his favor for equitable use. 2 Pomeroy Equity, sections 791, 792, 797.

The remaining question upon this branch of the case would be one of much difficulty if it were not settled by a former decision. Granting that there was no complete extinguishment of the judgment either by payment or by merger, there yet remains the question, can Morgan so use the judgment lien as to subject the land of the appellant to sale to satisfy it? As the

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initial step in the discussion, we state, as a fundamental principle, that merger is never prevented when fraud or wrong would result if it were defeated. *Worthington v. Morgan*, 16 Sim. 547; *Hutchins v. Carleton*, 19 N. H. 487; *McGiven v. Wheelock*, 7 Barb. 22. This is a just principle, and adherence to it is required by considerations of consistency as well as considerations of justice. A legal rule stands, unless confronted by a superior equity. If a legal rule will secure justice, equity will do nothing to defeat its operation, but, on the contrary, will do all in its power to give it complete and effective force. If, therefore, it is not equitable to defeat merger against the appellant, as to him equity will give the legal doctrine full sway, although as to others it may interpose to break down the rule of the law. Whether the appellant is in such a situation as to ask equity to allow the legal rule to take its course, we will hereafter determine and declare. Another matter demands consideration before examining the question of the influence exerted by the position which the appellant occupies, and that is this: Morgan must rely entirely upon equity to prevent a merger as against the appellant, and if what he asks is unconscionable, equity will not lend him a helping hand. Equity keeps the judgment alive only that it may be used by him for an equitable purpose. He can not, therefore, succeed upon equitable principles, unless his case is one in which good conscience requires that a legal rule be broken for his benefit, and the judgment kept alive in furtherance of justice. The legal rule is against him, and only equity can relieve him. His appeal is to a court of conscience, and it will be fruitless if his case is tainted by fraud or wrong. *Kitts v. Wilson*, *post*, p. 492. While it may be true that there is no complete merger under the legal rule, it does not follow that the judgment will be kept alive for an inequitable purpose.

We come now to the question, what is the equity of the situation? If it is with Morgan, the appellant must fail; if against him, the legal rule must, if we adhere to principle,

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and do not yield to the former decision, prevail, and the appellant succeed. Appellees' counsel say: "A sale of one tract of land is not invalid, notwithstanding one who was a later purchaser might have an order in equity for a sale in the inverse order had he properly applied for the same." They cite *Sansberry v. Lord*, 82 Ind. 521. It seems clear that the assertion of counsel, if it correctly states the rule, proves that their client is in no situation to invoke the aid of equity to overthrow a rule of law for his benefit against one possessing such equities as the appellant possesses. In the case to which counsel refer it was said: "It is presumed to be the duty of the judgment debtor, as between himself and his vendee, to pay the judgment, and if he retains any of the property encumbered by it, a court of equity will, without impairing the lien, require the judgment creditor to first exhaust the property held by the debtor so as to protect his vendee." This doctrine is strongly against the appellee Morgan, for he is here asking the aid of equity to break a legal rule, while he is himself seeking to do what equity condemns, inasmuch as he is asking equity to assist him, while he is at the same time seeking to break down the equitable doctrine that property shall be sold in the inverse order, commencing with that remaining in the judgment debtor, and going next to the property last sold by the debtor.

The rule that a purchaser of land may, by a timely and appropriate application to a court of equity, have lands remaining in the debtor first sold, and lands sold in the inverse order of their sale by the debtor, is a familiar and well established one. *Richey v. Merritt*, 108 Ind. 347; *Ritter v. Cost*, 99 Ind. 80; *Caley v. Morgan*, 114 Ind. 350; 12 Am. and Eng. Encyc. of Law, 216, note 1. But the case of *Caley v. Morgan*, *supra*, while fully recognizing the principle stated by us, adjudged that it is not applicable to such a case as this, for the reason that the owner of the land did not ask the assistance of a court of equity before the sale. The decision in that case, although not directly conclusive, because

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the parties here are not the same as in that case, must, as we suppose, be regarded as decisive of the question here under immediate mention, inasmuch as the judgment there involved, and the questions there under discussion were, with one exception, the same as those here under consideration. We yield to the decision in the case referred to with reluctance, because we are strongly impressed with the belief that it was not well decided, inasmuch as we believe that, while there was not a complete merger, Morgan can not escape the legal rule for the purpose of using the judgment in violation of an equitable principle.

There is in the present case one important and material fact not in the case of *Caley v. Morgan, supra*. That fact is this: Morgan caused the land to be exposed to sale without having the first sale set aside, or the entry of satisfaction made by him vacated. That fact was not considered in the case referred to, so that there is no judgment upon it. As the record exhibited the facts the judgment was satisfied, the first sale effective, and Morgan's rights under that sale complete. It is no doubt true that the appellant was charged with such notice as the record imparted, and that his averment that he had no actual notice of the judgment lien is unavailing. *Taylor v. Morgan*, 86 Ind. 295. But he had a right to rely upon the whole record, and part of the record informed him that the judgment was satisfied, and that part of the record was made by Morgan himself. If the appellant is bound by the record, so, also, is Morgan. In our judgment Morgan had no right to disregard the first sale at his own pleasure, and make a second one after having the judgment entered satisfied. If a stranger had bought the property, we think it quite clear that Morgan could not, by his own act, have treated the sale as a nullity. The sale was complete, the receipt of Morgan to the sheriff for the price of the property was as effective as payment in actual money would have been, for it is settled that where a judgment creditor buys at his own sale his entry of satisfaction of the judg-

ment is equivalent to payment in money, inasmuch as there is no reason for going through the empty form and idle ceremony of handing the money over to the sheriff and then receiving it back from him. It is also well settled that a sale upon a satisfied judgment is void. *Chapin v. McLaren*, 105 Ind. 563; *Myers v. Cochran*, 29 Ind. 256; *State, ex rel., v. Salyers*, 19 Ind. 423; *Laval v. Rowley*, 17 Ind. 36.

Morgan was the purchaser at his own sale, and even in ordinary cases would be held chargeable with notice of all irregularities, for he does not occupy the position of a *bona fide* purchaser. *Raub v. Heath*, 8 Blackf. 575; *Harrison v. Doe*, 2 Blackf. 1; *Keen v. Preston*, 24 Ind. 395; *Hamilton v. Burch*, 28 Ind. 233; *Piel v. Brayer*, 30 Ind. 332; *Bole v. Newberger*, 81 Ind. 274; *Carnahan v. Yerkes*, 87 Ind. 62; *Shirk v. Thomas*, 121 Ind. 147, and authorities cited; *Warren v. Hull*, 123 Ind. 126; *Johnson v. Hess*, 126 Ind. 298 (311). If a third person had bought the land at the first sale, and had paid his bid, the receipt of the amount paid by such purchaser by the execution creditor would unquestionably have extinguished the judgment. *Klippel v. Shields*, 90 Ind. 81; *Shields v. Moore*, 84 Ind. 440; *Moon v. Jennings*, 119 Ind. 130; *Kreider v. Isenbice*, 123 Ind. 10.

The appellee directs our attention to several authorities which we have examined, but we find nothing in them which opposes the conclusion we have stated. The case of *Harrison v. Doe*, *supra*, is adverse to the appellees, for in that case it was held that the sale was void as to the execution creditor purchasing at his own sale, but it is tacitly asserted that the rule would have been different had the land been bid off by a *bona fide* purchaser at the sheriff's sale. The decision in *Morss v. Doe*, 2 Ind. 65, is that a sale where there is no appraisement is void, and the decision in *Fletcher v. Holmes*, 25 Ind. 458, is to the same effect. In *Davis v. Campbell*, 12 Ind. 192, it was held that a sheriff's sale could not be successfully attacked in a collateral proceeding upon

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the ground that the sheriff refused to levy on personal property of the debtor. It is evident that none of these cases, nor any of a similar type, is in point here, for here there is of record a satisfaction of the judgment.

We agree fully with the statement of appellee's counsel that there are cases where a levy may be abandoned, but we can not agree that the rule that a levy may be abandoned controls such a case as this, where the record affirmatively shows that the first sale operated *prima facie*, at least, to satisfy the judgment. There is here much more than an abandonment of a levy and much more than the abandonment of a void sale, for the sale was, so far as the record shows, so effective as to induce the judgment creditor to satisfy the judgment of record. Presumptively, at least, the sale was not void or even voidable. If it was not void the appellees had no right at their sole pleasure and mere will to treat it as of no effect. They can not occupy inconsistent positions at their own volition. The argument, and it is a sound one, that a merely irregular sale can not be collaterally attacked, strikes strongly at the very foundation of the appellee's position. If an irregular sale can not be collaterally assailed, certainly the judgment creditor can not at his mere will or pleasure repudiate it and again expose the property to sale. He must first get rid of his own sale and his own entry of satisfaction. The appellee Morgan had a right to have the sale vacated if it was illegal or irregular. *Clayton v. Glover*, 3 Jones Eq. 371; *Galbreath v. Drought*, 29 Kan. 711. But having made the sale, purchased the property, entered the judgment satisfied of record, he has no right to ask that it shall be presumed, as against a *bona fide* purchaser from the judgment debtor, that the sale was illegal. It is settled that *prima facie* a levy is a satisfaction of the judgment to the extent of the value of the property levied upon. *McCabe v. Goodwine*, 65 Ind. 288, and authorities cited; *McIver v. Ballard*, 96 Ind. 76; *Harmon v. State, ex rel.*, 82 Ind. 197. There is much more reason for applying the

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presumption of satisfaction to such a case as this, than to a case where there is nothing more than a levy, for here there was a sale, and, as the record made by Morgan himself affirmatively shows, a satisfaction of the judgment.

We adjudge, without going further in this case, for there is no necessity for doing so, that the complaint shows a *prima facie* satisfaction of the judgment upon which the land was sold, and that the complaint is at least sufficient to drive the appellees to answer.

Judgment reversed.

Filed Feb. 2, 1892.

No. 15,343.

THE OHIO VALLEY RAILWAY AND TERMINAL COMPANY
v. KERTH.

RAILROAD.—Appropriation.—Use of Map in Evidence in Assessing Damages.—How May be Considered.—In assessing damages occasioned by the appropriation of a right of way across unplatted land near to or adjacent the platted territory of a city, a map showing how the streets of the city could be extended across such unplatted tract, and also showing its situation with reference to the city and its streets, may be put in evidence for the purpose of showing the size of the tract of land, its form, shape and relation to other territory; and it may also be considered to show the actual condition of the land and the right of way, if such facts are shown thereon; but it can not be considered as showing lots and streets laid off on such land, although the map show the tract as platted territory.

SAME.—Damages.—Value of Land Near City.—Prospective Use for City Purposes.—In assessing damages the jury may consider the proximity of the land sought to be appropriated to a city or town; and its increased value occasioned by the certainty of its near future use for suburban purposes.

SAME.—Value.—Proof of.—Competency of Witness to Testify to.—Sufficiency of Knowledge Concerning Land and Location of Railroad.—A witness who testifies that he is acquainted with the value of land in the vicinity of the land sought to be appropriated, and with the particular tract in ques-

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tion, both before and after the appropriation, may testify what its value was before the railroad ran through it and also its value after it ran through it, without first showing his knowledge of the railroad, the way it is located across the land, the fills and cuts, and other matters affecting the question of damages.

From the Vanderburgh Circuit Court.

D. B. Kumler, A. Gilchrist and C. A. De Bruler, for appellant.

P. Maier, J. S. Buchanan, C. Buchanan and P. W. Frey, for appellee.

OLDS, J.—This was a proceeding to condemn a strip of appellee's land for appellant's right of way, under the statute providing for the condemnation of land for such purpose.

An instrument of appropriation was properly filed, and thereupon appraisers were appointed by the Vanderburgh Circuit Court, and the appraisers made their appraisal, assessing appellee's damages at \$1,000.

Exceptions were filed by appellee. There was a trial in the circuit court, and a verdict was returned in favor of appellee for \$2,325.

Appellant filed a motion for a new trial, which was overruled, and exceptions reserved, and judgment rendered upon the verdict.

The only error assigned is the overruling of appellant's motion for a new trial.

The first question presented by the motion for a new trial and discussed by counsel, is the ruling of the court in admitting in evidence a map of appellee's land through which the railroad is located, and a portion of which is condemned for right of way.

The appellee owned a tract of land a half mile long and three hundred and twenty feet wide. The right of way sought to be condemned was forty feet wide, running diagonally across the strip of land a distance of something over seven hundred feet, and occupying less than one acre.

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Appellee's land is situate three-eighths of a mile from the corporation line of the city of Evansville. It is bounded on each end by two of the main roads into the city. Lying between the corporation line and appellee's land is a platted addition to the city of Evansville, which is one-quarter of a mile in width and about a half mile in length, and lying adjacent to the corporation line. This platted addition is called Auburn. The streets in this addition are platted to correspond with the streets within the city limits, are an extension of the same, and bear the same names as the streets within the corporate limits. This addition is regularly platted, and some buildings are upon it.

Between the addition of Auburn and appellee's land is a strip of unplatted land one-eighth of a mile wide. Appellee had a plat made of Auburn, the strip of land between Auburn and appellee's land, and of his own land, showing it all as platted into lots and an extension of the streets of the city across the lands of the appellee.

Appellee contended that his land was so situated that, in the ordinary growth of the city of Evansville, it would be needed, and would necessarily soon become a part of the residence portion of the city; that it was so situated that its location and quality of soil made it valuable to be platted as a part of said city; that the land was valuable for the purpose of being platted as a part of the city, as the usual and ordinary growth of the city would justify it; and for the purpose of showing the adaptability of the land for the purpose of platting the same as an addition to the city, the appellee offered in evidence the map which he had prepared, showing how it would divide into lots of certain dimensions without waste, and at what points and in what manner the streets of the city would extend through it. Instead of endeavoring to have witnesses explain to the jurors its adaptability for platting as an addition to the town, how many lots it could be divided into, and the location of the streets and alleys, the appellee sought to place before the jury a profile of the

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land platted by actual measurement, showing how it could be platted, the number and size of the lots, the location of the streets and alleys.

It was not contended that the land was platted, or that the appellee was entitled to recover for it as platted land, but it was contended that one element of value that the tract of land had was its location in close proximity to a large and growing city, and its susceptibility to be platted and used as residence property made it more valuable than it otherwise would be.

We think the admission of the plat in evidence was clearly proper. In the case of *Boom Co. v. Patterson*, 98 U. S. 403, the court says: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

This rule clearly authorizes the jury to take into consideration the value of the land to be platted as an addition to the city of Evansville now or in the immediate future, and it was proper for the appellee to show its adaptability for that purpose, and this could be more clearly demonstrated by the use of a map or plat made from actual measurements than by the mere parol statements of witnesses.

In the case of *Cincinnati, etc., R. W. Co. v. Longworth*, 30 Ohio St. 108, the court, in proceedings to appropriate land, says: "In offering testimony on this issue the owner was not limited to any pre-existing use of the land. If it was of little value as a farm, or for common uses, and was of great

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value as mineral land or a town site, that fact might be shown, though it had never been so used."

The court instructed the jury in a way to have prevented any harm coming from the introduction of the plat, even if it had a tendency to mislead jurors.

In the seventh instruction the court said to the jury: "You should take the property and situation as it has been shown to be by the evidence at the time of the appropriation. In so far as any map or plat put in evidence in this cause by the plaintiff shows lots and streets laid off on plaintiff's land, you should not consider it, as it is conceded that no streets exist, and the ground has not been platted. In so far as said map or plat shows the size of the land, its form and shape and relation to other territory, you may consider it, and when it may show the actual condition of said land and the right of way and railroad, you may consider it."

This instruction certainly tells the jury they shall not consider anything that is improper about the map.

It was shown by the civil engineer who made the plat that it was made from an actual survey and measurement. The plat, we think, was proper to be considered in determining the adaptability of the land to be divided into lots and platted as an addition to the city, if the jury determined that the land at the time it was appropriated was adapted to such use or had a special value at that time, in view of its location and the growth of the city, making it reasonable to expect it to be available for such purpose in the immediate future, and the instruction took from the jury the right to consider it for such purpose, and is certainly as favorable to the appellant as should have been given.

It is insisted that the court erred in refusing instruction numbered one requested by the appellant.

This instruction was covered by the instructions given by the court. The court told the jury that mere speculative values should not be considered in estimating the damage,

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and this is all in effect that the instruction refused covered upon this point.

The instructions given do not allow the jury to consider any value on account of any future use the land may be put to.

The situation may have been such as that the natural growth of the city and the proximity of the land to it fixed its use for suburban residences in the immediate future with such certainty as to make the land of additional value on that account at the time of the appropriation, and if such were the facts the jury had a right to consider it in estimating the amount of damages.

The next question presented relates to the competency of some of the witnesses to speak upon the question of the value of the land with and without the railroad.

The witnesses first testified that they resided in the locality, and were acquainted with the value of lands in that locality; that they were acquainted with this particular land; and then they were asked what was its value before the railroad ran through it, also after the railroad ran through it, and they answered both questions.

It is contended that the witnesses, before they were permitted to answer, should have been required to show their knowledge of the railroad, the way it is located across the land, the fills and cuts, and other matters affecting the question of damages.

The knowledge of these facts go to the weight to be given to the testimony of the witness; but the witnesses showed themselves competent to speak upon the question, and counsel for appellant had the right to more fully examine the witnesses upon their knowledge of the land, its location, and location of the railroad, and how the grade or fills or cuts affected its value, as tending to lessen the weight to be given to their evidence.

Counsel contend that they are expert witnesses, and they must state the facts upon which they base their opinion. In

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speaking of values the facts necessary to entitle the witness to speak are, that he is acquainted with the market value of such property in that locality, and that he is acquainted with the property upon which he places a value.

The appellee in this case owns a tract of land a half mile in length by three hundred and twenty feet in width, situate within three-eighths of a mile of the corporate limits of the city of Evansville, and within one-eighth of a platted addition to the city, with a main road leading into the city bordering on each end of the land. The appellant located a railroad across the land, and commenced legal proceedings to condemn the right of way. An appeal is taken, and the case comes up for trial. A witness is called, and asked if he is acquainted with the value of land in that locality. He answers that he is. He is then asked if he is acquainted with the land of the appellee. He is then asked the market value of the land before the railroad run through it. Objection is made on the ground that the witness has not shown himself competent to speak. The witness is permitted to answer, and he is then asked what is the market value of the land now with the railroad through it. The same objection is made and overruled, and the witness answers. These questions assume, and it is admitted, that at the time the witness is speaking there is a railroad constructed and running across the land, and the witness says he is acquainted with it. If acquainted with it, he is acquainted with it having the railroad of the appellee running across it. So that the question sought to be presented and discussed by counsel for appellant is not in fact presented by the record, for in the form the questions are propounded to the witnesses they assume, and it is not controverted, that the railroad of appellee runs through the land at the time, and the witnesses testify that they are acquainted with it, and, if acquainted with it, they know of the railroad, and upon the theory of appellant's counsel are qualified to speak of its value.

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We have put the question in the strongest light for the appellant, as most of the witnesses reside in the neighborhood, own land both near to and within the city limits, show a personal acquaintance with appellee's land, and a general knowledge of the value of land in that locality.

There is no error in the record.

The judgment affirmed, with costs.

Filed Feb. 17, 1892.

No. 15,533.

JUSTICE v. THE PENNSYLVANIA COMPANY.

MASTER AND SERVANT.—Fellow-Servant.—Section Foreman.—Vice-Principal when.—A section foreman of a railroad, with power to employ and discharge section hands, is a vice-principal when employing and discharging servants; but he is a fellow-servant in his control of the men after their employment; and for an injury to a member of his gang, occasioned by such foreman's negligence, the railroad company is not liable.

SAME.—Rank of Servant not Determinative.—Whether or not two persons, at a given time, are fellow-servants is not a question of rank.

SAME.—When and where not a Fellow-Servant.—If at the time the offending servant performs the act by which another servant is injured he is in the performance of a duty which the master owes to his servants, he is not a fellow-servant; but if the offending servant is in the discharge of a duty which he owes to the master, he is a fellow-servant with others engaged in the same common business.

• **SAME.—Delegation of Power.—Liability of Master.—Vice-Principal.**—A master can not rid himself of the duty he owes to his servants by delegating his authority to another; and if he attempts to do so, the person to whom he delegates the power to act is a vice-principal, and not a fellow-servant.

From the Clark Circuit Court.

D. C. Anthony and L. A. Douglass, for appellant.

S. Stansifer, for appellee.

COFFEY, J.—The material facts alleged in the complaint
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in this case are, that on the 9th day of May, 1888, the appellant was in the employ of the appellee as a section hand, with a gang of four other men, engaged in the repair of appellant's railroad track, of which gang one McCleary was foreman; that it was the custom of appellee to delegate to such foremen as were in its employment the power to employ and discharge section hands, and that the appellant was employed by said McCleary, who had power to discharge him; that it was the duty of McCleary to direct appellant, and the gang with which he worked, how, when and where to work, and to direct and control the manner of using the various tools, implements and other means used to perform the work, and that he had the absolute control and supervision of the use and movements of a certain hand-car used by said gang in the prosecution of their work; that on said day, after the day's work was completed, appellant and said gang, with McCleary, got upon said hand-car for the purpose of returning the same, with the tools, to the place where they were usually kept, when another gang, consisting of seven section men, placed their hand-car upon the track, and started after the appellant and the gang with which he was associated; that each of said hand-cars was propelled by power applied to wheels by means of cog-wheels connected with rods fastened to two levers, which said levers rested on an upright projecting above the floor of the car about two or three feet; that the gang, composed of seven men, were on a hand-car longer and heavier than the car used by the appellant and his gang, and that the levers and apparatus used to propel the same were longer in proportion, and capable of propelling the car at a rate of speed double that of the one on which appellant was travelling; that said men ran their car up to and against the car upon which appellant was, and began to and did run the same at great speed, which caused the levers on appellant's car to work up and down with such rapidity that it became and was difficult for appellant to maintain his hold on them, and that by reason of the small space on the plat-

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form of the car, it was dangerous to let go the lever, the hold on the same being the only means by which appellant could maintain his position on the car; that said McCleary knew that the rapid motion of said levers was dangerous to those upon the car, and that it was difficult for appellant to retain his hold thereon, and so knowing, carelessly and negligently failed to apply the brake and check the speed of the car, though said brake was convenient to him, and not convenient to the appellant; that by reason of the rapid speed of the car, and the motion of the levers thereon, the hold of the appellant became loosened, without any fault or negligence on his part, and said lever struck the appellant, whereby he was greatly injured; that said McCleary carelessly and negligently permitted said other car to butt up against the car upon which appellant was travelling without any objection thereto, and permitted the gang thereon to propel and push ahead appellant's car at a very rapid rate of speed, and carelessly and negligently permitted the same to continue without raising any objection thereto, or applying the brake until said accident occurred.

To this complaint the circuit court sustained a demurrer, and the propriety of this ruling is the only question for our consideration.

The complaint is drawn upon the theory that the facts therein stated constitute the section foreman, McCleary, a vice-principal, and the appellant seeks, in this court, to convince us that the complaint, upon that theory, states a cause of action. On the other hand it is contended by the appellee that, under the facts alleged in the complaint, it appears that the section foreman was a fellow-servant with the appellant, for whose negligence the appellee is not liable. The matter, then, for decision by this court is as to whether the section foreman, under the facts alleged in the complaint, was a vice-principal or a fellow-servant.

The rule in this State that the master is not liable to his servant for an injury occasioned by the negligence of a fel-

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low-servant, is too well established and is too familiar to call for the citation of authority.

It is also settled that the question of rank, in most cases, throws no light upon the inquiry as to whether two persons were, or were not, at a given time, fellow-servants, for it is not a question of rank. *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124.

Notwithstanding the fact that the general rule which holds the master is not liable to his servant for the negligence of a fellow-servant is well understood, it is often difficult to determine, from a given state of facts, who are, and who are not, fellow-servants. Ever since the decision in the case of *Priestley v. Fowler*, the first decision upon the subject, decided in England in the year 1837, and reported in 3 Mees. & W. 1, judges and text-writers have attempted to lay down some rule or formula by which to determine what servants of a common master may be said to be fellow-servants.

Judge Cooley says: "Persons are fellow-servants where they are engaged in the same common pursuit under the same general control." Cooley Torts, p. 541, note 1.

Judge Thompson says: "All who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who take the risk of each other's negligence." Thompson Negligence, p. 1026, section 31.

Mr. Wood says: "The true test of fellow-service is the community in that which is the test of service, which is subjection to the control and direction of the same common master, in the same common pursuit." 3 Wood Ry. Law, section 338.

Mr. Beach says: "All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accom-

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plishing the same common object, are to be held fellow-servants in a common employment." Beach Cont. Neg., section 332.

It is said that all these rules are faulty, and of little practical use, by reason of their being stated so broadly and in such general and comprehensive terms.

The question as to whether the relation of fellow-servants exists in a given case is, in our opinion, determined by an inquiry into the nature of the service at the particular time in question. If, at the time the offending servant performed the act by which another servant was injured, he was in the performance of a duty which the master owed to his servants, he was not a fellow-servant, for the rule is fundamental that the master can not rid himself of the duty he owes to his servants by delegating his authority to another, and if he attempts to do so, the person to whom he delegates the power to act is a vice-principal, and not a fellow-servant. *McKinney Fellow-Servants*, section 23; *Indiana Car Co. v. Parker*, *supra*; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Louisville, etc., R. W. Co. v. Sandford*, 117 Ind. 265; *Cincinnati, etc., R. W. Co. v. Lang*, 118 Ind. 579.

On the other hand, if at the time of the alleged negligence the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow-servant with others engaged in the same common business, and the master will not be liable for any injury inflicted upon such fellow-servant by reason of his negligence.

That a section foreman may be a vice-principal is not doubted. In this case he was a vice-principal in the matter of hiring and discharging hands, for the master owes it as a duty to exercise reasonable care not to employ any but careful men, and to discharge those who prove to be negligent.

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In the hiring and discharging of the men he was in the performance, therefore, of a duty which the master owed to his servants and was, while so engaged, a vice-principal. But it was not so in transporting the men to and from their work. In the matter of moving the hand-car and their tools to and from the locality at which they worked upon the track, they were in the discharge of a duty which they owed the master and were, therefore, fellow-servants. *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226; *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Slattery v. Toledo, etc., R. W. Co.*, 23 Ind. 81; *Sullivan v. Toledo, etc., R. W. Co.*, 58 Ind. 26; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Robertson v. Terre Haute, etc., R. R. Co.*, 78 Ind. 77; *Indiana Car Co. v. Parker, supra*; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Capper v. Louisville, etc., R. W. Co.*, 103 Ind. 305.

The negligence alleged against the foreman in charge of the appellant is that he failed to apply the brake, and failed to object or protest against the conduct of those who ran their hand-car against the one in his charge. Had he acted as brakeman, under the circumstances disclosed in this case, he would have been acting as a fellow-servant with the appellant, and not as vice-principal. Indeed, the only matter in which he did not act as a fellow-servant was the matter of employing and discharging servants.

For these reasons the complaint before us does not state a cause of action, and the court did not err in sustaining a demurrer thereto.

Judgment affirmed.

Filed Feb. 18, 1892.

 McGuffey v. McClain et al.

No. 15,505.

MCGUFFEY v. MCCLAIN ET AL.

130	327
130	585
130	327
159	127

SUBROGATION.—*Indemnifying Mortgage.—Sale of Land.—Misappropriation of Collateral Security.*—*Subrogation to Mortgage Held by Person Misappropriating Collateral Securities.*—A. brought suit against B. to foreclose a mortgage the latter had given the former to secure the purchase-money thereof. C. and her husband had previously executed an indemnifying mortgage to D. on the same property B. mortgaged. Subsequently C. and her husband sold the land to A., by whom it was sold to B. At the time of the sale by C. she placed in A.'s hands certain notes and accounts to secure her from loss by reason of the indemnifying mortgage executed to D. A. undertook to collect the notes and accounts and to properly apply their proceeds; but she, after collecting such proceeds, appropriated them to her own use. The indemnifying mortgage executed to D. was released and satisfaction entered of record.

Held, that C. was entitled to so much of the proceeds of A.'s mortgage, and to be subrogated thereto, as would satisfy her claim against A.

SAME.—*Following Property.—Change of Form.*—The form into which property changes is not material, for equity will follow the property into whatever form it may assume in order to secure it for the person entitled to it.

JURISDICTION.—*No Right of Action.—Existence of.*—Jurisdiction is nothing more than judicial authority over a general subject, and may exist even though there be no right of action.

PLEADING.—*Prayer not a Test of.*—A pleading is tested and construed by the facts it states, not by its prayer.

EVIDENCE.—*Objections to.—Part Competent.*—If part of the testimony of a witness is competent, a general objection to all of it may be overruled.

From the Blackford Circuit Court.

G. W. Steele and J. A. Kersey, for appellant.

W. H. Carroll, G. D. Dean, J. Cantwell and S. D. Cantwell, for appellees.

ELLIOTT, C. J.—Margaret McGuffey brought the suit out of which this appeal grows to foreclose a mortgage executed by James J. Maddux and others. The appellees came in as intervenors, and filed a cross-complaint. Before the submission of the cause for trial upon the issue joined on the cross-complaint, judgment was rendered on the complaint against

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the mortgagors, and the amount adjudged the mortgagee was paid into court. The issue joined upon the cross-complaint was decided in favor of the appellees, and they were decreed entitled to a lien upon the money paid into court by the mortgagors. As appears from our synopsis of the case, the questions here are between the intervenors and the mortgagee. The first of these questions arises on the ruling of the court holding good the cross-complaint of the intervenors.

The cross-complaint states these material facts: Amanda J. McClain is the wife of her co-intervenor, Walker H. McClain, and was his wife prior to the 20th day of March, 1883. On that day she was the owner of a certificate of purchase issued to her by a commissioner authorized to sell real estate, and on the same day she assigned the certificate to William Carroll. She and her husband executed to Carroll a mortgage on the property here the subject of controversy, to secure him against loss, there being some doubt as to the validity of the title to the land held under the commissioner's certificate. Subsequently the intervenors sold the land embraced in the mortgage to the appellant, Margaret McGuffey, by whom it was sold to the mortgagors, Maddux and others. At the time of the sale to Margaret McGuffey the intervenors placed in her hands promissory notes and accounts to the value of four hundred dollars, to secure her from loss by reason of the indemnifying mortgage executed to Carroll. The notes and accounts were delivered pursuant to a written agreement, wherein the appellant undertook to collect the notes and accounts and to properly apply the avails. The notes and accounts were collected, and the appellant appropriated the proceeds. The indemnifying mortgage executed to Carroll was released and satisfaction entered of record. The appellant, Margaret McGuffey, and her husband, are not residents of the State of Indiana. The suit against the mortgagors was brought to collect the purchase-money due from the mortgagors to Margaret McGuffey.

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We have no doubt that the matters stated in the cross-complaint are so connected with the main controversy as to entitle the appellees to intervene, provided their cross-complaint shows a right of action. The controversy is as to who is entitled to the purchase-money of the same parcel of land. The theory of Amanda J. McClain is that she is entitled in equity to the purchase-money, because she was the original owner of the land, and is the person to whom the money is owing. If the cross-complaint shows a right of action, that right is necessarily connected with the original controversy, and that controversy, with all its incidents, was before the court for adjudication. We think there is no strength in the contention that there was no jurisdiction in the trial court to determine whether the McClains or the McGuffeys were entitled to the unpaid purchase-money due from the mortgagors of McGuffey. Jurisdiction may exist where there is no right of action, for jurisdiction is nothing more than judicial authority over a general subject.

The real question in the case is whether the cross-complaint shows a right of action in the appellees. If, as the demurrer confesses, the appellant appropriated the proceeds of the notes and accounts deposited with her as collateral security, Amanda J. McClain is entitled to recover the money so collected and appropriated in some form of action. There can be no doubt that there is a valid claim against the appellant, for she has money in her hands that belongs to Mrs. McClain. The only possible doubt is as to the remedy; there can be none as to the primary right.

The right of the appellee Amanda McClain to the money being clear and undoubted, the nature and origin of the right are only important as affecting the question of the remedy, but upon that question the origin and nature of the right are important considerations. We think the origin and nature of her right are such as to give her an equitable claim upon the proceeds realized upon the mortgage executed to the appellant, Margaret McGuffey. Mrs. McClain

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owned the land, and the money paid into court really comes from the land. Her right is substantially that of a vendor having a lien for unpaid purchase-money. The object in depositing the notes and accounts with Mrs. McGuffey was to protect her from loss because of the indemnifying mortgage to Carroll, and it was equivalent to permitting her to retain so much money as the notes and accounts represented out of the agreed price of the real estate. We think it clear that, if money had been retained, Mrs. McClain might, in the capacity of an unpaid vendor, have subjected any interest in the land held by her grantee to her equitable lien. And, as "equity looks through form to substance," the character of the thing retained can not impair the rights of the vendor. The central truth is, that Mrs. McClain ought, in good conscience, be paid for her land. To secure her, equity will seize upon any interest in the land which remained in the grantee.

The doctrine of equitable conversion is influential here. The form into which property changes is not material, for equity will follow the property into whatever form it may assume, in order to secure it for the person entitled to it, and in this instance it will follow the interest of Mrs. McGuffey in the land in the form it assumed under the mortgage executed to her. The equity of Mrs. McClain is strong, and will prevail against the bald technical objection that she can not have relief in such a suit as this, for the meritorious right she possesses is one equity will not disregard; for "equity delights to do justice, and that not by halves."

The appellant's counsel are undoubtedly correct in asserting that a pleading must proceed upon a definite theory, and on that theory state a cause of action or defence. But while we agree to the premise of counsel, we controvert their conclusion. The cross-complaint before us states the facts and outlines a theory, and that theory is, that the intervenor is entitled to reach the interest of the appellant in the land. It

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is true that the pleading prays for subrogation, but it also prays for other relief, so that the prayer for subrogation is not exclusive or controlling. Even if there was only a prayer for subrogation, the appellant's conclusion would not follow. A pleading is tested and construed by the facts it states, not by its prayer. *Houck v. Graham*, 106 Ind. 195 (202); *Anderson v. Ackerman*, 88 Ind. 481; *Carver v. Carver*, 97 Ind. 497 (505); *Lovely v. Speisshoffer*, 85 Ind. 454; *Stribling v. Brougher*, 79 Ind. 328.

But we are not to be understood as holding that the cross-complaint does not make a case for equitable subrogation; on the contrary, we adjudge that it does make such a case. The courts will give effect to the substantive facts, and assign to them their equitable force. *Proctor v. Cole*, 104 Ind. 373 (382); *Otis v. Gregory*, 111 Ind. 504 (512). The force to be assigned to the facts pleaded is that Mrs. McClain was entitled to reach by subrogation the mortgage estate which her debtor and grantee held in the land. The land was the primary security for the unpaid purchase-money, and such security may be made available by the vendor, where to make it available will not injure third persons. The mortgage executed to the grantee represented her interest in the land, and to that interest equity subrogates the appellee Amanda McClain as a vendor who has not received pay for the land sold to the vendee.

The point, made under the specification of error based upon the ruling denying a new trial, that the trial court erred in excluding evidence, we dispose of by saying that, where the exclusion of evidence is not stated as a cause for a new trial, no question is presented on appeal.

The appellant objected to the testimony of Walker McClain concerning an order given for the notes and accounts deposited as collateral security. It is quite clear that part, at least, of the testimony of the witness was competent, and as the objection does not separate the competent from the in-

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competent, there was no error in overruling it. *Jones v. State*, 118 Ind. 39, and cases cited; *Pape v. Wright*, 116 Ind. 502.

Judgment affirmed.

Filed Feb. 16, 1892.

No. 16,239.

CLARK ET AL. v. THE MANUFACTURERS' MUTUAL FIRE INSURANCE COMPANY.

INSURANCE.—*Meaning of "Damages" in Section 3753.*—The word "damages," as used in section 3753, R. S. 1881, means fire losses.

SAME.—*Assessments.—When Can be Made.*—Under section 3753 assessments are only authorized for the payment of the just claims of members, founded on policies, and only to pay an excess of the claim over the remainder of the fund on hand after deducting expenses.

SAME.—*Meaning of "Member" in Section 3753.*—The term "member" used in said section 3753 is synonymous with policy-holder, so far as it relates to the payment of fire losses.

SAME.—*Two Classes of Policy-Holders.—Equality of.*—The fire losses of both the paid up policy-holders and those of the purely mutual plan stand on the same footing.

SAME.—*Cancellation.—Right to Make Contract for.*—An insurance company may make a contract for the right to cancel a policy on certain conditions, and providing for the refunding of unearned premiums paid.

SAME.—*Unearned Premiums.—Preference of Paid up Policy-Holders Over, Unpaid.*—Paid up policy-holders in a mutual fire insurance company, organized under the laws of this State, for which a receiver has been appointed, and whose policies have been cancelled under an order of the court, are entitled to have their unearned premiums paid, after the payment of the expenses of the company, out of any money remaining on hand, in preference to the claims of members for fire losses, who must resort to the fund to be created by the payment of premium notes.

MARSHALLING ASSETS.—*Two Funds.—Election.*—A person having two funds to satisfy his demands can not by an election disappoint another person who has only one fund to which he can resort.

From the Marion Superior Court.

V. Carter, S. J. Peelle and W. L. Taylor, for appellants.

F. M. Finch and J. A. Finch, for appellee.

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MCBRIDE, J.—The Manufacturers' Mutual Fire Insurance Company, organized under the laws of this State, was, on the 26th day of April, 1890, by the superior court of Marion county, at the suit of one of its policy-holders, and on a showing and confession of danger of insolvency, placed in the hands of a receiver to close up its affairs with a view to going out of business.

The controversy in this case is between the receiver and certain creditors of the company, who, by their intervening petition, show, in substance, the following facts.

The company, while doing business, issued two forms of policies, one under the purely mutual plan, wherein the assured executed a premium note, which note was liable to be assessed to make assets with which to pay all just claims founded on policies issued by the company. Such policy-holders were, as such members of the company, entitled to share in the profits, if any, in addition to their liability to assessment on their premium notes to pay losses.

The other form of policy is designated in the petition as the "all-cash premium policy," in which the assured paid a fixed and certain premium in cash, and gave no note. Such policy-holders were not members of the company, were not entitled to share in its profits, and were not liable to assessment to pay losses. Both forms of policy contained stipulations reserving to both parties the right to cancel the policy on certain conditions, and providing for the refunding of unearned premiums paid.

It is shown by the petition that, immediately on the appointment of the receiver, he, by order of the court, cancelled all out-standing policies. The claims of the petitioners are all for unearned, return premiums, due on policies thus cancelled, and with one exception the policies were all-cash premium policies.

The petition makes the following showing of the assets and liabilities of the company:

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ASSETS.

Premium notes, assessable under the statute . . .	\$100,000
Cash received for premiums on all-cash premium policies	5,000
Cash received from other sources	5,000
Total	\$110,000

LIABILITIES.

Fire losses unpaid	\$40,000
Amount due on unearned return premiums on all-cash policies at date of cancellation	4,000
Amount of the unearned cash portion of premium on the mutual policies	2,000
Total liabilities	\$46,000

The petition shows the amounts of the several claims of the petitioners, that they had made and filed proofs thereof with the receiver, who, it was alleged, admitted and recognized them as indebtedness of the company, but refused to allow or admit them as proper demands to share in any dividend or dividends that might be declared by him on the liabilities of the company.

It is further shown that the receiver has declared and paid a dividend of twenty per cent. upon the claims for fire losses, which was paid out of the cash on hand, including the \$5,000 received from premiums on all-cash premium policies, but refused to allow or pay a like dividend on their claims, or to admit and include them in any amount for which an assessment can be made on the premium notes. The petitioners asked for an order directing the receiver :

1st. To apply the sum of \$5,000, received from premiums on all-cash premium policies, to the payment of their claims.

2d. If this could not be done, to order him to pay them a dividend of twenty per cent., to make them equal with the claims for fire losses.

3d. That their claims for unearned premiums be allowed

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as valid claims, entitled to share in all dividends declared.

4th. That the receiver be directed to admit and include their claims in the amount for which an assessment shall be made on the premium notes.

The petition concluded with a general prayer for relief.

The court sustained a demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action, or to entitle the petitioners to any relief whatever.

The determination of this question requires us to construe sections 3752 and 3753, R. S. 1881, which are as follows:

"3752. Every person who shall become a member of such company shall, before receiving a policy, deposit his, her, or their promissory note, as a premium note, and shall pay such further consideration, on or before receiving the policy, as may be agreed upon; and such note shall be payable, in whole or in part, when, on any assessment, the directors may require the same. But should any person insuring in such company so desire, he can pay a definite consideration, in lieu of giving a premium note; and in this case, the person so insured shall not be deemed a member, nor entitled to share in the accumulations of the company. And such company may, if it so desire, take a promissory note, for the cash premium, for such length of time, on any policy, as may be agreed upon; and if such premium note shall remain unpaid after it becomes due, the company shall not be held responsible for any loss or damage that may take place under any policy for which such note was given."

"3753. The funds of every such corporation shall be invested in stocks or loaned on security, as the directors may order; and shall be appropriated, first, to pay the expenses of the corporation, and then to pay the damages which any member may be entitled to recover on his policy. And if any member shall have a just claim on the corporation, founded on a policy issued by it, exceeding the amount of its then existing funds, exclusive of deposit notes given by the

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members, the directors shall forthwith assess such sum as may be necessary to pay the same upon the members, in proportion to the amount of their premiums and deposits, severally, for seven years; but no member shall be liable to pay, in the whole, more than the amount of his premium and deposit note."

It will be observed that the section last above quoted, which relates to the investment and appropriation of the funds of the company, only recognizes, in terms, two objects to which the funds (by which is evidently meant all money received from any source except that realized from assessments on premium notes) may be appropriated. These two objects are: 1st. Payment of expenses; and, 2d. Payment of damages which *members* may be entitled to recover on their policies.

This, as we construe it, means fire losses. Assessments are only authorized for the payment of the just claims of *members*, founded on policies, and only to pay an excess of the claim over the balance of the fund on hand after deducting expenses.

As section 3752 provides that one insuring on the "all-cash premium" plan "shall not be deemed a member, nor entitled to participate in the accumulations of the company," if this provision is to be construed literally, and only those insured on the mutual plan are members, there is no provision whatever made for paying a loss incurred by those who are not insured on the mutual plan. The statute, in terms, recognizes only liability to members.

It can not be supposed, however, that the Legislature, when it authorized the making of contracts of insurance on the all-cash premium plan, did not also intend to provide for the payment of losses arising under such policies.

We are of the opinion that, fairly construed, the term "member," when used in section 3753, in the connection indicated, is synonymous with policy-holder. From this it re-

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sults that fire losses on both classes of policies stand on the same footing.

They are equally entitled to payment out of the fund on hand, and premium notes may be assessed, not only to pay losses suffered by those insured on the purely mutual plan, but for the payment of losses suffered by members who have paid their premiums in full in advance. *Jackson v. Roberts*, 31 N. Y. 304.

Assessments on premium notes can, however, only be made to pay fire losses. *Sinnissippi Ins. Co. v. Taft*, 26 Ind. 240. In the case cited it is held that the premium note is "sacred to the purpose of indemnity of members against losses by fire," and can not be used for any other purpose. See, also, *Boland v. Whitman*, 33 Ind. 64.

This disposes of the claim of the petitioners to share in all dividends declared, or in the proceeds of any assessments on premium notes.

Construing section 3753 again, literally, we find no provision whatever made for the payment of claims of the character here involved.

Unearned premiums are neither losses nor expenses. The cancellation of the policies was, however, in accordance with the terms of the contract, and the contract was one the parties might lawfully make. *Boland v. Whitman*, *supra*. The claims of the petitioners for unearned return premiums are therefore just and valid claims against the company. The only fund out of which they can be paid is the \$10,000 cash on hand. The primary claim upon this fund is that for expenses; but, accepting the showing made as full, there are no expenses unpaid. After the payment of expenses, this fund may be applied to the payment of fire losses. The members to whom fire losses are due have therefore two funds to which they can resort, while the holders of claims for unearned return premiums have but one. It thus becomes a question of the marshalling of assets. We have here two classes of

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creditors and two funds. One class of creditors (claimants of fire losses) have access to both funds, while the other class (the petitioners herein) are confined to one, and in that one fund the first class has the superior right.

We think the case is clearly within the equitable principle upon which the rule for the marshalling of assets depends, that a person having two funds to satisfy his demands, shall not by his election disappoint a party who has only one fund. *Aldrich v. Cooper*, 8 Vesey, 308; 2 Leading Cases in Eq. 228, and notes to same; *Hannegan v. Hannah*, 7 Blackf. 353.

We think it is not within the case of *In re Professional Life Assurance Co.*, 3 L. R. Eq. 668, as we think here the premium notes in themselves constitute a fund, which was created for that express purpose, so that when the conflicting rights of the two classes of creditors arose the two funds were in existence. In our opinion the petitioners have the right to insist that the fund created by the premium notes be first exhausted in payment of fire losses, and that the cash fund on hand be not drawn upon for that purpose for enough to so impair it that it will be insufficient to pay the claims of petitioners, unless the other fund prove insufficient to pay the fire losses. It follows that the receiver erred in declaring and paying the dividend already paid from the cash on hand. He should be directed by the court to assess upon the premium notes and collect such sum as will, with the surplus of cash fund over and above the expenses and unearned return premiums, suffice to pay fire losses. Only in the event that the premium note fund proves insufficient to pay fire losses should the cash fund be drawn upon for that purpose far enough to defeat the claims of the petitioners. If the dividend already declared and paid has that effect, the petitioners are entitled to be subrogated to the rights of the other class of creditors, in the other fund, for enough to make them whole.

The petitioners are not entitled to relief in any of the spe-

Tomlinson v. Harris.

cific forms indicated in the prayer to their petition, but under the general prayer for relief with which the petition closes, the court is empowered to extend any relief justified by the facts pleaded.

Judgment reversed, with instructions to the superior court of Marion county to overrule the demurrer to the petition, and for further action in accordance with this opinion.

Filed Feb. 16, 1892.

No. 16,245.

TOMLINSON v. HARRIS.

130	339
130	429
130	339
154	374

APPEAL.—*Amendment of Bill of Exceptions*.—An appeal will not lie to the Supreme Court from a proceeding instituted in the Superior Court to amend a bill of exceptions embraced in the transcript of a case then pending in the Supreme Court.

From the Marion Superior Court.

F. Knefler and *J. S. Berryhill*, for appellant.

T. E. Johnson, *S. M. Shepard* and *W. E. Niblack*, for appellee.

MILLER, J.—This is an appeal from a proceeding instituted in the superior court to amend a bill of exceptions which was embraced in the transcript in *Harris v. Tomlinson*, *post*, p. 426, then pending in this court.

The proceeding was a part of, or auxiliary to, the original cause, and in such case an appeal will not lie to this court as from an original case. *Hamilton v. Burch*, 28 Ind. 233; *Seig v. Long*, 72 Ind. 18; *Hannah v. Dorrell*, 73 Ind. 465; *Harris v. Tomlinson*, *supra*.

Where a suit is instituted to correct a bill of exceptions, or other record, not in aid of a pending suit, an appeal will lie as in other actions.

Quinn v. The State.

This appeal is therefore dismissed; costs in this court against the appellant.

Filed Feb. 16, 1892.

No. 15,944.

QUINN v. THE STATE.

130 340
163 510

CRIMINAL LAW.—*Instructions.*—*Directing Bailiff to Give.*—It is error for the trial court, in a criminal prosecution, to direct the bailiff to go into the jury room and give the jury instructions as to the return of their verdict.

SAME.—*Reception of Verdict by Attorney.*—It is error to direct that the verdict should be received by an attorney, unless he is appointed a special judge.

From the Marshall Circuit Court.

J. D. McLaren and *E. C. Martindale*, for appellant.

A. G. Smith, Attorney General, and *S. N. Stevens*, Prosecuting Attorney, for the State.

ELLIOTT, C. J.—The judgment in this case must be reversed. The trial judge directed the bailiff to go into the jury room and give the jury instructions as to the return of their verdict. He also directed that the verdict should be received by an attorney of the court, but did not appoint him a special judge.

Judgment reversed.

Filed Feb. 17, 1892.

Nichols v. Colgan.

No. 15,223.

NICHOLS v. COLGAN.

FRAUD.—*Misrepresentations Procuring Sale.*—*Defence in Action for Purchase-Money.*—Fraudulent and wilful representations concerning the adaptability and value of land, who relies thereon, and which brings about a sale to the person to whom they are made, can be pleaded as a defence in an action to recover the purchase-money, to so much of such purchase-money as actually exceeds the value of the land so purchased.

SAME.—*Agent.*—*Conspiracy.*—*Misrepresentations.*—The fraudulent representations of an agent made in pursuance of a conspiracy between the principal and agent are the representations of the principal.

From the Pulaski Circuit Court.

W. Spangler and H. A. Steis, for appellant.

N. L. Agnew and B. Borders, for appellee.

OLDS, J.—Martha Nichols, appellant, brought these proceedings against Catharine Colgan, appellee, to review a judgment on account of errors of law.

In the original complaint the appellant alleges that she was the owner of a tract of 80 acres of land situate in Pulaski county, and she sold the same to the appellee for the sum of \$1,500, to be paid for as follows: \$250 cash, \$250 in thirty days, and \$1,000 in two years, less \$183 of a school-fund mortgage then upon said land. The \$817 was to be secured by a mortgage on said premises due in two years, with six per cent. interest, interest to be paid annually, and appellee to pay said school fund mortgage as a part of said purchase-price. In pursuance of said agreement appellant conveyed said land to the appellee by warranty deed on the 13th day of April, 1887, and appellee paid to the appellant \$250, and appellee took possession of the premises, and still holds possession of the same, and has wholly failed and refuses to pay the sum of \$250, payable in thirty days, and although requested so to do, failed and refuses to execute a mortgage securing said \$817, as she agreed; that the \$250 is long past due, and the

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time for the execution of said mortgage has long since passed. Prayer for judgment for said sum of \$250, and that the appellee be compelled to execute a mortgage for said sum of \$817 in pursuance of said contract, and that the same be declared a lien on said land.

Appellee answered the complaint, and the appellant filed a demurrer to the answer, which was overruled, and exceptions reserved to the ruling. The appellant replied, and the cause was tried by the court, resulting in a finding and judgment in favor of the appellee.

The appellant filed a motion for a new trial, which was overruled, and exceptions reserved, and time given for the filing of a bill of exceptions, and the bill of exceptions was duly prepared, signed and filed in the clerk's office of said court.

The appellant filed her complaint in this action, alleging the error of the court in overruling the demurrer to the answer and overruling the motion for a new trial as grounds for reviewing the judgment.

The appellee filed a demurrer to the complaint in this action, which was sustained, and judgment rendered on demurrer, and from this judgment appellant prosecutes this appeal.

It is contended that the court erred in overruling appellant's demurrer to the appellee's answer in the original action. In said answer the appellee alleged that the appellee, at the time she made the contract, was an old, feeble, crippled woman unable to travel, walk or attend to any business for herself; that she, with her family of three sons and one daughter, were living in the city of Chicago; that the appellant and her husband well knew the condition of the appellee, and knew her family; that her son Joseph, for some three years prior thereto, and at the time of making the said contract, worked at the stock yards in said city of Chicago, and had no experience in farming, and knew nothing of farming or farm lands, as the appellant and her husband well

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knew; that in March, 1887, Charles Nichols, the husband of the appellant, acting as agent for his wife, and in pursuance of a conspiracy previously formed between said appellant and her husband, came to the stock-yards in Chicago and brought with him several ears of large, fine and well-matured corn, and several large, fine and well-matured potatoes, and exhibited them to appellee's son Joseph C. Colgan and others, and said it was raised on the said eighty acres of land owned by appellant in said Pulaski county the previous year, and stated that it was a fine farm, and as good land as there was in said Pulaski county; that the corn and potatoes were fair specimens of the crops raised on said land the previous year, and stated that there was twenty-two acres in cultivation, and there was a good house on the land; that said Charles Nichols shortly afterwards, and while still acting in pursuance of said conspiracy between himself and appellant, spoke to said Joseph Colgan, and wanted to sell him the land mentioned and described in the complaint; said Joseph told him he did not want the land as he expected to remain in Chicago, but if it was such land as he said it was he would have his mother buy it for herself and his brothers and sister a home, as his brothers were out of work, and would like to have a farm; said Charles Nichols replied that it was as good a farm as there was in Pulaski county, and was well worth \$2,000, but he did not want it and would sell it for \$1,500. Joseph then told said Nichols that neither he nor his brothers were farmers, and never farmed, and knew nothing about farming or wild land, and if they purchased the land would have to take his word as to the condition and value of the land; that he could not go himself to see the farm, but would send his brothers to see how the buildings on the farm would suit his mother, and at the same time told him that his brothers knew nothing of farming or wild lands in this country, and had never seen corn grow; that said Charles Nichols and Joseph Colgan for three years had been and were their friends and ac-

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quaintances, having worked together at the stock-yards during that time; that shortly thereafter William and Charles Colgan, brothers of Joseph, of whom he had spoken, and said Nichols, at a time when no crops were growing on said land, came to said Pulaski county in pursuance of said agreement between said Nichols and Joseph Colgan to see said farm and inspect the buildings thereon; that said William and John Colgan, as appellant and her husband well knew, were born in England and had but recently come to America, were totally ignorant of the condition and value of farming and wild lands in America, and especially so as to lands in Pulaski county, which appear well to the inexperienced but are worthless and fit for nothing, and calculated only to deceive persons unacquainted with the condition and value of lands; that, in pursuance of said conspiracy, said appellant met her husband and William and John Colgan in Pulaski county and proceeded with them on their tour of inspection; that said William and John did not examine said land, and could not have done so if they had desired, for the reason that they did not know wild from cultivated land, as appellant and her husband well knew, but did inspect the buildings on said land, and complained that there was not enough room in the house, and said Nichols agreed to build an addition to said house to make it large enough, but failed to do so; that appellant and her husband kept said William and John away from any person who would have informed them of the true value and condition of said land, by telling them that the persons whom they met and the neighbors whom they desired to call upon were thieves and persons of bad repute, and they should be careful to have nothing to do with them, but took them to the house of one Kline, a special friend of said appellant and her husband, and said Kline, to aid them in the design of cheating the appellee, said the land was cheap at \$1,500, and that it was probably in the gas belt, and if gas should be found in the county the land would at once be worth double that sum;

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that said land lies a short distance from the town of Gundrum in said county, and when they were passing through said town in going to the land, knowing the appellee was a member of the Catholic church, and a daily attendant on the service in said church, and knowing she was unable to go more than a short distance to church, told said John and William that there was a Catholic church in said town, and pointed out the place where he said it was located, which was hidden from view by some trees, and pointed out the house which he said was the residence of the priest; that said representations made by the appellant and her husband were communicated to her, and she made the contract mentioned in the complaint, believing the same to be true, and implicitly relying on the same, but she avers that said representations were wholly and totally false and fraudulent, and were made only for the purpose of cheating and defrauding her; that the land, so far from being worth \$1,500, was not worth more than \$400 at the time she made said contract, and was not worth \$250, subject to the \$183 mortgage thereon; that it was not worth as much as the best land in said county, but was and is poor, wet, swampy and inferior, and almost worthless, while there are fine, valuable lands in said county, worth more than \$200 per acre; that said corn and potatoes exhibited to her said son Joseph were not grown on said land, and were not fair samples of the corn and potatoes grown on said land the previous year; that the corn and potatoes grown on said land the previous year were poor, small and worthless; that there was only five acres in cultivation on said land, instead of twenty-two acres, as represented; that there was no Catholic church at Gundrum, and none nearer than Winamac, a distance of eight miles, as said Nichols well knew, and she is deprived of attending church service; that neither the appellee nor any of her family ascertained the true condition of said land until after she had taken possession of the same and moved upon it; that at the time she made said contract and received said deed

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she had never seen said land, and took it wholly upon the faith of the statements and representations made by said appellant and her husband, which were false, as they both well knew.

Some of the representations alleged in this contract are not such as would be available.

The facts alleged in the paragraph show that the negotiations were carried on principally by the husband of the appellant acting for her, and by the sons of the appellee acting for the appellee. If a fraud was practiced by false representations made by the husband of the appellant in pursuance of a conspiracy between the appellant and her husband to the sons of the appellee acting for the appellee in negotiating the purchase, the appellee is as clearly entitled to relief against the fraud as if the representations were made to her in person.

It clearly appears from facts alleged that the appellee was in such a state of health on account of age and other afflictions that she was not able to get about and attend to the business herself; that the sons were totally unacquainted with landed property, as to the condition of the soil, its state of cultivation and value, and that these facts were all well known to the appellant and her husband. It alleges that the appellant and her husband entered into a conspiracy to cheat and defraud the appellee in the sale of the land, knowing that the negotiations would have to be conducted through the sons of the appellee. It further appears that the husband, Charles Nichols, and Joseph Colgan, were, and for three years had been, friends and associates, having worked together during that time, and taking advantage of the friendship, after being admonished by Joseph that he knew nothing about the condition of either farm or wild land, or of the value of either, and if a purchase was made he would have to rely on his representations as to its condition and value.

We think the answer clearly states facts sufficient to withstand a demurrer.

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The only other question presented by the record and discussed by counsel relates to the sufficiency of the evidence to sustain the finding of the court.

There is no such lack of evidence that this court would have reversed the judgment on appeal, and hence the appellant is not entitled to have the judgment reviewed on account of the insufficiency of the evidence.

There was no error in sustaining a demurrer to the complaint.

Judgment affirmed, with costs.

Filed Feb. 18, 1892.

No. 15,115.

THE PENNSYLVANIA COMPANY v. BRUSH, ADMINISTRATRIX.

NEGLIGENCE.—*Of Railroad Company.—Defective Tie.—Injury to Employee.*—

In an action for the death of plaintiff's decedent, alleged to have been caused by the defendant's negligence, the complaint alleged that while the decedent, a yard conductor in the employ of the defendant, was making up a train and coupling cars his foot caught under the slivered portion of a defective tie, whereby he was, without fault on his part, thrown down on the track, run over and killed; that the decedent had no knowledge of the defective tie which caused his injury, and that the defendant had knowledge of such defect long enough before the decedent was injured to have repaired the same, but negligently failed and refused to make such repairs.

Held, that the complaint stated a cause of action.

BILL OF EXCEPTIONS.—*Evidence.*—The long-hand manuscript of the evidence, taken by the official reporter, does not become part of the record on appeal to the Supreme Court unless it is embodied in a bill of exceptions.

From the Whitley Circuit Co

J. Brackenridge and A. Zollars, for appellant.

L. M. Ninde and H. W. Ninde, for appellee.

130	347
134	640
136	469
130	347
141	504
130	347
147	565
130	347
153	622
130	347
171	296
171	315
171	404

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COFFEY, C. J.—The complaint in this case is in a single paragraph, and alleges, among other things, that the appellant possesses, maintains, uses, and operates at the city of Fort Wayne, as part of the Pittsburgh, Fort Wayne and Chicago Railroad and its appurtenances, a large yard covered with switches and tracks for switching purposes and standing grounds, and upon which trains are to be made up for transportation upon its railroad; that in said yard appellant employs divers locomotives, engines, and divers crews of employees to do such switching, and make up such trains for transportation over its road; that, on the 16th day of August, 1887, the deceased, Edward L. Brush, was in the employ of the appellant at said yard as yard conductor, and on that day, and for a long time prior thereto, the appellant had carelessly and negligently suffered and permitted one of its tracks near the crossing of the same with Hanna street to become and remain out of repair, and in a dangerous condition for the deceased, and other employees, to do their work, and to switch, conduct, couple, and uncouple, and make up trains thereon, and that on that day, and a long time prior thereto, appellant had carelessly and negligently suffered and permitted a certain tie under its track on said yard to become and remain for a long period of time split, slivered and out of condition, and dangerous, and negligently suffered said split and slivered portion of the tie to be and become raised up and sprung away and separated from the main portion of said tie, whereby it had been and was on that day dangerous to the deceased and the other employees of appellant in doing their switching and conducting and making up trains; that by reason of the condition of the tie the track was uneven, out of repair, and dangerous for the purposes for which it was used; that on the 16th day of August, 1887, it became and was the duty of the deceased to conduct one of the appellant's engines and trains over and along the track, and couple and uncouple certain cars on said train, at the point where the defective tie was situated; that

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while so engaged in conducting, managing and making up the train it became and was his duty to couple certain cars therein; that he carefully and diligently went in between the cars to couple the same, and while he was so conducting the train and coupling the cars, and carefully moving along between the same to effect the coupling, his foot came in collision with and caught under and against the defective tie, and against and under the split and slivered portion thereof, whereby he was, without any fault whatever on his part, thrown down on the track, run over and killed; that the deceased did not know at the time he was injured and killed, nor had he at any time theretofore, any knowledge of the defect which caused his injury; and that the appellant had knowledge of such defect long enough before the deceased was injured to have repaired the same, but negligently failed and refused to make such repair.

As preliminary to the objection urged against this complaint, it is proper to say that it is the duty of the master to use ordinary care and diligence to provide safe working places and safe machinery and appliances for his employees, the neglect of which is an actionable wrong, and he can not absolve himself from liability by delegating such duty to another.

It is not only the duty of the master to exercise reasonable care to furnish his employee with a safe place to work and safe machinery, but it is his further duty to exercise a reasonable supervision over it, and to exercise ordinary care in keeping it safe for the use of his servant. *Nordyke & Marmon Co. v. Van Sant*, 99 Ind. 188; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Bradbury v. Goodwin*, 108 Ind. 286; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440.

These principles of the law are not disputed by the appellant, but it is earnestly contended that the nature of the defect causing the injury was such that the deceased was

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bound to know of its existence ; and, this being so, he is presumed to have taken upon himself the increased risk occasioned by the defect described in the complaint.

It is true that where a servant engages with the master to perform work in a place which such servant knows to be unsafe, or where such place is in such condition that the danger is perfectly apparent, the servant takes upon himself the risk incurred thereby, and is presumed to have contracted with reference to the danger he encounters, and, if injured in the service, he has no right of action against the master. *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1 ; *Griffin v. Ohio, etc., R. W. Co.*, 124 Ind. 326 ; *Vincennes, etc., Co. v. White*, 124 Ind. 376 ; *Rietman v. Stolle*, 120 Ind. 314 ; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75.

But in this case it is expressly alleged that the deceased had no knowledge of the existence of the defective tie which caused his injury. There is nothing in the complaint from which it can be inferred that it was any part of his duty to inspect the road, and presumably such duty belonged to those whose business it was to keep the road in repair. Nor is there anything in the complaint from which we can assume that he passed over that portion of the track where the defective tie was found at any time between the date at which it became out of repair and the date of the injury.

In our opinion the complaint states a cause of action, and the court did not err in overruling the demurrer addressed thereto.

It is also insisted by the appellant that the evidence in the cause does not sustain the verdict of the jury.

This contention is met by the appellee with the claim that the evidence is not in the record, and that for this reason the objection urged is not before us.

From a return to the writ of *certiorari* issued out of this court it appears that the long-hand manuscript of the shorthand reporter was not embodied in a bill of exceptions.

A skeleton bill was prepared and signed, leaving a blank

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for the insertion of the long-hand manuscript of the evidence. This did not bring the evidence into the record. It could only be brought into the record by being embodied in a bill of exceptions. *Woollen v. Wishmier*, 70 Ind. 108; *Lowery v. Carver*, 104 Ind. 447; *Wagoner v. Wilson*, 108 Ind. 210; *Stone v. Brown*, 116 Ind. 78; *Colt v. McConnell*, 116 Ind. 249; *Flint v. Burnell*, 116 Ind. 481; *Harrell v. Seal*, 121 Ind. 193; *Patterson v. Churchman*, 122 Ind. 379; *Ohio, etc., R. W. Co. v. Voight*, 122 Ind. 288.

The evidence not being in the record, the question as to whether it supports the verdict is not before us.

Judgment affirmed.

OLDS, J., took no part in the decision of this cause.

Filed Oct. 7, 1891; petition for a rehearing overruled Feb. 20, 1892.

No. 15,327.

WILLARD ET AL. v. AMES ET AL.

TAXES.—*Wife Purchasing Land Held by Her Husband as Tenant at Tax Sale.*

—A wife may purchase at tax sale land occupied by her husband as tenant, and will acquire at least a valid lien for the amount of the purchase-price; and the mere fact that there is an agreement, of which she has knowledge, between him and his landlord to the effect that he is to pay the taxes will not avoid the sale.

SAME.—*Duty of Wife to Pay Husband's Taxes.*—A wife is under no legal obligation to pay the taxes due on her husband's land.

SAME.—*Person in Possession.—Agreement to Pay Taxes.—Purchase at Tax Sale.*

—A person in possession of land, under covenant to pay taxes, can not permit the land to be sold and acquire title against the rightful owner, by becoming the purchaser at the tax sale.

SAME.—*Who Can Not Purchase at Tax Sale.*—Neither an agent, attorney, tenant in common or for life, or a mortgagor can acquire title to land of his principal or against the mortgagee, by purchase at tax sale.

SAME.—*Payment or Tender of Taxes.—Suit to Set Aside Sale.*—A sale for taxes will not be set aside and declared void until the taxes actually due are paid or tendered.

130	351
139	398

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CHANGE OF VENUE.—*More than One Change to the Side.*—If a change of venue from the judge is granted upon the application of one of the defendants, another change can not be granted on the application of another defendant.

From the Lawrence Circuit Court.

G. A. Bicknell, N. Crooke and J. H. Willard, for appellants.

— *Martin and J. E. Boruff*, for appellees.

MILLER, J.—This was an action brought by the appellees against the appellants, to quiet the title to a tract of real estate.

The complaint was in two paragraphs, the first being in the ordinary form, alleging that the plaintiffs were the owners of the land in fee simple, and the defendants claimed an interest therein adverse to the plaintiffs, which claim was without right, and was a cloud upon the plaintiffs' title.

The second paragraph, as amended, averred that in 1872 Kate Ames was the owner of the property, and that there was then pending a certain slander suit, in which Joseph Hendricks was plaintiff and Oliver Ames defendant; that said Kate Ames and the plaintiff in the slander suit entered into an agreement in writing, to the effect that if Hendricks would dismiss the slander suit against said Oliver he, Hendricks, should have the premises described in the complaint free of rent until the youngest of the plaintiffs should become of age, provided Hendricks would pay the taxes on the property and keep the same in repair; that, in pursuance of the agreement, Hendricks took possession of the property; that Kate Ames died in the year 1877, and the plaintiffs are her heirs at law, and are now over the age of twenty-one years; that said Joseph Hendricks violated said agreement by allowing the property to become delinquent for taxes, and permitting the same to be sold therefor; that Rebecca Hendricks, who was the wife of said Joseph, became the purchaser of the property at tax sale, she at the time having

full knowledge of the written agreement; that the plaintiffs were without knowledge, until recently, that the property had been sold for taxes, or that it had become delinquent; that, since the sale of the lot to Rebecca Hendricks by the auditor, she has sold and conveyed the same to the defendants, who had full knowledge of the facts herein stated; that plaintiffs can not set out a copy of the written agreement for the reason that the original is in the hands of the defendants' counsel.

The prayer is that the conveyance from Rebecca Hendricks to the defendants be declared *null* and *void*, and that the title of the plaintiff be quieted.

A demurrer was overruled to this paragraph of complaint, and this ruling is assigned as error here.

The paragraph of complaint under consideration proceeds upon the assumption that the tax sale to Rebecca Hendricks was ineffectual to convey title, because she was the wife of Joseph Hendricks, who was in possession of the land at and prior to the tax sale, under an agreement to pay the current taxes, and that, having acquired no title under that sale, she could convey none to the appellant.

It is well settled that one in possession of land, under covenant to pay taxes, can not permit the land to be sold, and acquire title against the rightful owner by becoming the purchaser at a tax sale. *Blackwell Tax Titles*, section 579; *Black Tax Titles*, section 145; *Busch v. Huston*, 75 Ill. 343.

This doctrine has been extended to include agents and attorneys, tenants in common, tenants for life, mortgagors, and other lien-holders.

In *Bernal v. Lynch*, 36 Cal. 135, it was held that the purchase of property at a sale for taxes, by the agent of one who was in possession of land, either by himself or his tenants, did not pass or otherwise affect the title to the land.

In *Burns v. Byrne*, 45 Iowa, 285, it was held that a husband who was in possession of property with his wife, and

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presumably enjoying the profits of the land, could not neglect to pay the taxes and purchase the property at a tax sale so as to acquire a valid title, either against her or one who was a tenant in common with her.

In *Laton v. Balcom*, 64 N. H. 92, it was held that a husband could not become the purchaser of the separate real estate of the wife by a clandestine payment of taxes. The opinion recognizes the separate property rights of the husband and wife, but holds that, owing to the confidential relations existing between them, it would be inequitable, shocking to the moral senses, and a palpable violation of the marital contract to permit either party to thus deal with the property of the other.

In *Carter v. Bustamente*, 59 Miss. 559, the court held that the wife of a grantor in a trust deed could acquire a tax title to the incumbered land, and defend against a purchaser at a sale by the trustee.

CHALMERS, J., in a concurring opinion, suggested that a wife might be estopped from setting up a title acquired by a husband's default in paying his taxes.

We have been unable to find a case in which the precise question before us has been adjudicated.

It seems to be settled law that a husband, whose duty it is to look after the business interests of his wife and family, as well as to support them, will not be permitted to acquire title to the property of his wife by purchase at a tax sale; but we know of no law to prevent a wife from purchasing at a public tax sale the lands of her husband, or of others of which he is in possession, provided the purchase is made on her own account and with her own money. A wife is under no obligation, moral or legal, to pay the taxes on her husband's property.

If, however, such purchase was made with the funds of the husband, or by his procurement, or for his use, or in pursuance of an arrangement made between the husband and wife, in fraud of the owner or joint owner of the property, a

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very different question would arise. A purchase by the wife of real estate in possession of the husband, under an agreement requiring him to pay taxes, is of itself sufficient to excite suspicion.

In the case before us there is no suggestion of fraud or unfair dealing, except such as might be inferred from knowledge of the wife that the husband had agreed to pay the taxes. We are of the opinion that this is not sufficient. We can not infer that which is not pleaded.

We do not hold that Rebecca Hendricks acquired the legal title to the property in controversy by her purchase. That is not before us. It does, however, appear that she has expended money in the purchase of this land; that, as between her and the plaintiffs in the action, they ought to refund to her, if her tax deed does not transfer the title, and that she has by her conveyance transferred her right to this fund to the appellants.

In such case, before the plaintiff can be heard in a court of equity to ask that such sale and conveyance be set aside and declared void, and their title quieted, they must do that which equity requires, namely, pay or tender that which has been expended for their benefit. *Shannon v. Hay*, 106 Ind. 589; *Rowe v. Peabody*, 102 Ind. 198; *Hewett v. Fenstermaker*, 128 Ind. 315.

It follows that the court should have sustained the demurrer to the second paragraph of the complaint.

The court did not err in refusing to grant a second change of judge after one had been allowed upon application of one of the defendants. *Peters v. Banta*, 120 Ind. 416; *Griffith v. Dickerman*, 123 Ind. 247.

Some other questions are presented for our consideration by the appellants in their brief, but inasmuch as they are not likely to arise on a second hearing, and we are not favored with an argument by the appellees, we will not discuss them.

Judgment reversed.

Filed Feb. 20, 1892.

Hilker, Administratrix, v. Kelley.

No. 15,243.

HILKER, ADMINISTRATRIX, v. KELLEY.

130	356
130	473
130	356
143	367
130	356
152	87

ABATEMENT.—*Action for Tort—Death of Plaintiff After Verdict Returned.—Judgment Nunc Pro Tunc.*—*Laches.*—In an action of tort which lapses with the death of the person, if the plaintiff die after verdict returned and before judgment rendered, judgment in favor of his personal representatives or sole heirs may be entered *nunc pro tunc*, unless such representatives or heirs are guilty of laches in moving for judgment.

INSTRUCTIONS.—*Evidence not in Record.—Rule as to those Given.*—If the evidence is not in the record, the Supreme Court will not reverse the judgment on instructions given, unless they are so radically wrong that they could not be correct as applied to any supposed case which might have been made under the issues.

From the Marion Superior Court.

J. B. Black, for appellant.

J. L. Griffiths and *A. F. Potts*, for appellee.

McBRIDE, J.—On the 1st day of May, 1888, the appellee recovered a verdict in the superior court of Marion county against Henry Hilker, in an action for personal injuries which she alleged she had sustained by reason of his actionable negligence.

Three days later, and within the term at which the verdict was recovered, Hilker, by counsel, filed a written motion for a new trial.

On the 11th day of May, 1888, while this motion was pending, and before it had been argued or submitted, Hilker died.

June 12th following, the appellee moved the court for a judgment in her favor on the verdict *nunc pro tunc*, as of the date of May 5th, 1888.

With her motion, and in support of it, she filed a showing of the foregoing facts: That immediately after the return of the verdict counsel for Hilker gave notice of his intention to file a motion for a new trial, which was in fact done May 4th, 1888, and that Hilker died intestate, leaving

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the appellant, Fredrika Hilker, his widow and his only heir at law.

On the 18th day of June, 1888, the appellee filed proofs of the service of the foregoing notice on said Fredrika Hilker and on Hon. James B. Black, who was the attorney of record of the decedent in the cause.

April 9th, 1889, the appellant, by counsel, appeared specially to the motion, and filed her written motion to quash the notice as to her, and to dismiss the motion for a judgment *nunc pro tunc*.

It is unnecessary to here set out the grounds of the motion, as they will fully appear hereafter. At the same time Hon. James B. Black, as *amicus curiæ*, filed his affidavit, showing that the appellee did not make any request, demand or motion for judgment on the verdict, before the filing of the motion for a new trial, or during the term of court at which the verdict was returned.

May 11th, 1889, the court overruled the motion of the appellant, and sustained that of the appellee, and rendered judgment on the verdict in favor of the appellee as of the date of May 5th, 1888, at the same time and by the same order and entry overruling the motion for a new trial filed by Henry Hilker May 4th, 1888. It was further ordered and adjudged that Henry Hilker should be deemed to have excepted, as of that date, to the overruling of his motion for a new trial, and that sixty days' time, from the date of the order be allowed to his heirs and personal representatives within which to prepare and file any bills of exceptions necessary to the saving of any exception taken by said Henry Hilker, and necessary to the perfecting of an appeal. Further and full orders were made, saving to the heirs and personal representatives of the decedent the rights of exception, of filing bills of exception and of appeal, without prejudice from lapse of time, from the entry of judgment *nunc pro tunc*, or otherwise.

The record shows that the appellee in open court con-

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sented to the foregoing terms and conditions as conditions upon which her judgment was rendered. The judgment, on appeal to the general term, was affirmed.

The principal controversy is over the rendition of the judgment *nunc pro tunc*.

The question is new to this State, although, as will be seen hereafter, it has frequently arisen elsewhere. The nearest approach this court has ever made to the consideration of the question was in the case of *Stout v. Indianapolis, etc., R. R. Co.*, 41 Ind. 149. In that cause the original plaintiff, Peter Stout, recovered a verdict and judgment in the Marion Superior Court. On appeal to general term the judgment was reversed, and the cause was remanded to special term for a new trial. Stout appealed from the judgment of general term to this court, and died, the appeal to this court being prosecuted by his administrator. It was held that the judgment of reversal left the party without a judgment, and simply with an action pending; and that, as the cause of action did not survive, the power to prosecute the appeal, together with the cause of action itself, died with the plaintiff. If, in the case at bar, the superior court in general term had reversed the judgment rendered at special term; or, if at special term, the motion for a new trial had been sustained, the cases would have been substantially alike. The appellee would, in that case, have had merely a cause of action which died, with the defendant below. Here, however, when Hilker died the appellee's cause of action against him had merged in a verdict, and was no longer a mere cause of action. This, we think, is settled by the great weight of authority. In our opinion it is also equally well settled that in such cases the court may, on a proper showing of the facts, enter a judgment *nunc pro tunc*, as of a day anterior to the death of the defendant. *Brown v. Wheeler*, 18 Conn. 199; *Freeman Judgments*, section 56 *et seq.*; *Griffith v. Ogle*, 1 Binn. 172; *Perry v. Wilson*, 7 Mass. 393-5; *Goddard v. Bolster*, 6 Greenl. 427; *Craven v. Hanley*, Barnes' Notes, 255; *Collins*

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v. *Prentice*, 15 Conn. 423 (428); *Dial v. Holter*, 6 Ohio St. 228; *Rightmyer v. Durham*, 12 Wend. 245; *Mackay v. Rhineland*, 1 Johns. 408; *Diefendorf v. House*, 9 How. Pr. 243; Black Judgments, section 128. See, also, *Long v. Hitchcock*, 3 Ham. (O.) 274; *Lewis v. Soper*, 44 Maine, 72; *Gray v. Thomas*, 20 Sm. & M. 111; *Hess v. Cole*, 23 N. J. L. 116; *Ehle v. Moyer*, 8 How. Pr. 244; *Spalding v. Congdon*, 18 Wend. 542; *Kelley v. Riley*, 106 Mass. 339.

The case of *Brown v. Wheeler*, *supra*, was *trespass vi et armis*. Plaintiff recovered a verdict, and defendant died while a motion in arrest of judgment was pending. The court held that judgment should be rendered as of a term when the defendant was living, saying: "It is conceded that this is law with respect to all cases which survive, and in which the executor may enter. But it is contended that the practice does not extend to cases of tort, which do not survive. We find no such distinction made in the books. On the contrary, the general principle is laid down without such a limitation; and certainly we should not feel disposed to introduce such a limitation, as we do not think that it is founded in reason. On the contrary, we find that in cases which were of a character that they would not survive, this practice has been adopted; as in case of conspiracy, *Griffith v. Ogle*, 1 Binn. 172; in trespass *quare clausam fregit*, *Perry v. Wilson*, 7 Mass. R. 393 (395)."

Dial v. Holter, *supra*, was an action for slander. Verdict for plaintiff, and motions for new trial and in arrest. While these motions were pending the defendant died. The court said: "Personal actions, by the common law, as well as by our statute, abate by the death of the party. If, before verdict, such an event happens to one of the suitors, the case is brought to an end. But if after verdict, and before judgment, he dies, the rule is different. The right to recover being established, and the amount of damages determined by the verdict, it shall continue in force, and a judgment may be given upon it as of the term when it was rendered." The court, after citing some of the cases above

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cited, says: "These and other cases to the same point, proceed upon the supposition that judgment might and undoubtedly would have been entered for the plaintiff in time, had it not been for the delay occasioned by the defendant in filing his motion for a new trial, and that when the motion does not prevail, it ought not to work any prejudice to the rights of the plaintiff."

In *Diefendorf v. House*, *supra*, the court says that the practice of entering a judgment *nunc pro tunc*, as of a term prior to the death of the party, in such cases depends upon the rule of common law, "that when parties are hung up by act of law, neither of them loses his right, but eventually judgment is entered up *nunc pro tunc*, as if the party were still alive;" citing several authorities.

It is said, however, to be a matter of discretion, and if the delay is imputable to the laches of the party interested in the judgment, the courts will refuse to interfere. If the delay is caused by the act of the court in delaying its action, or of the opposite party, by interposing motions, or otherwise, the party not in fault is not to suffer by it. See also 1 Wait's Practice, 153; 33 Alb. Law Jour. 205; *Springfield v. Worcester*, 2 Cushing, 52, which in principle is analogous; *Estee Pl.* (3d ed.), section 3260; *Tidd Pr.* (4th Am. Ed.) 932; *Burnham v. Dalling*, 16 N. J. Eq. 310; *Campbell v. Mesier*, 4 Johns. Ch. 334; *Denoon v. O'Hara*, 1 Brev. (S. C.) 500; *Allston v. Sing*, Riley (S. C.) 29.

As above shown, the verdict was returned on the 1st day of May. The motion for new trial was made May 4th, and no steps were taken in the meantime by the appellee for judgment on the verdict. The showing, however, is that the defendant's counsel at once gave notice on the return of the verdict that they would move for a new trial. We do not think this delay was such laches as will deprive the appellee of the right to a judgment on the verdict.

Thus far we have considered only the one question as that

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over which the principal, and we think the only substantial controversy is waged. Before leaving this branch of the case we feel impelled to express our obligation to counsel for the assistance they have rendered us in the examination of this question. The discussion by counsel for both parties is characterized by marked ability and great fairness.

Counsel for the appellant ask us to consider some of the questions raised by the motion for a new trial. It is insisted that the motion for a new trial should have been disposed of before ruling upon the motion for a judgment *nunc pro tunc*.

As above shown, the ruling of the court on both motions appear in the same order-book entry; that on the motion for new trial being entered last. This, in view of the circumstances of the case, was at most a mere informality, and could not by any possibility have harmed the party.

Counsel discuss the sufficiency of the complaint, but, as the record shows no demurrer filed, and we find no assignment of error on that ground, the discussion is only pertinent as bearing on the exceptions taken to instructions.

It is claimed that the court erred in certain of the instructions given. As the evidence is not in the record, if the instructions given would be proper under any evidence that might have been given under the issues, this court will presume such evidence was in fact given.

In such a case this court will not reverse the judgment on instructions given, unless they are so radically wrong that they could not be correct as applied to any supposed case which might have been made under the issues. *Joseph v. Mather*, 110 Ind. 114; *Weir, etc., Co. v. Walmsley*, 110 Ind. 242; *Rapp v. Kester*, 125 Ind. 79, and cases cited in each.

In our opinion this will preclude the examination of all the instructions challenged except one relating to the measure of damages. After careful consideration of the objections urged to this instruction, we do not feel that we would be justified in copying it into the record or considering it at

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length. We do not think the court erred in giving it. Indeed we find no error in the record.

Judgment affirmed.

Filed Feb. 19, 1892.

No. 15,410.

ROACH v. BAKER.

PARTITION.—*Decree not Final.*—An order decreeing partition is not a final decree in the full and true sense of the term, for it remains open for the purpose of controlling the mode and basis of the partition.

SAME.—*Decree.*—*Effect of.*—*Commissioners' Report.*—*Subsequent Sale.*—An order directing partition and appointing commissioners does not conclusively adjudicate the question as to the divisibility of the land; and if the commissioner report that the land is not susceptible of division, the court may approve the report and order a sale of the property.

From the Elkhart Circuit Court.

J. D. Osborne and *A. S. Zook*, for appellant.

J. H. Baker and *F. E. Baker*, for appellee.

ELLIOTT, C. J.—The appellee petitioned the court to decree partition of land in which he claimed an undivided interest. In the interlocutory order directing partition it is adjudged that "the plaintiff owns the undivided two-thirds part in value, and the defendant owns the undivided one-third part in value of the land." The order concludes thus: "It is farther considered, adjudged and decreed that partition be made by setting off to the plaintiff the two-thirds of said real estate, and to the defendant the one-third thereof; that Robert Irwin and Thomas Miller be and they are hereby appointed commissioners to make partition of said real estate in accordance with this decree, and that they make report of their proceedings at the next term." The commis-

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sioners filed a report, wherein it was stated that "We find that said premises can not be divided without damage to the owners." To this report the appellant unsuccessfully excepted. Over her objection the court accepted the report, and ordered the land sold.

The appellant's counsel proceed upon the theory that the same effect must be assigned to the order directing partition as to a final judgment or decree. This is, as we think, assigning a stronger and greater effect to the interlocutory order than the authorities warrant. It is true that as to the right to partition the order is final. *Dillman v. Cox*, 23 Ind. 440 (445); *Fleenor v. Driskill*, 97 Ind. 27; *Benefiel v. Aughe*, 93 Ind. 401; *Kreitline v. Franz*, 106 Ind. 359. But it is not true that it is final in such a sense as to end the entire proceeding, for that remains open for other steps. It remains open, under the provisions of our statute, for the purpose of controlling the mode and basis of the partition. This is necessarily so, for the specific parcels of land assigned to the parties respectively can not be known until the coming in of the report of the commissioners. It is evident, therefore, that the order decreeing partition is not a final decree in the full and true sense of the term. It only remains to inquire and decide whether the order directing the partition and appointing commissioners conclusively adjudicates that question as to the divisibility of the land, and precludes the court from acting upon the report of the commissioners that it is not divisible. We are clear that the order does not conclude the parties upon the question of the divisibility of the land. Our judgment is that it is the duty of the commissioners to report, in the proper case, that the land is not susceptible of division, and that the court may approve the report and order a sale of all the property. Section 1195, R. S. 1881; *Shull v. Kennon*, 12 Ind. 34; *Lake v. Jarrett*, 12 Ind. 395; *Lucas v. Peters*, 45 Ind. 313 (318). We decide the question presented by the exception, and give

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no opinion upon the question whether there are, or are not, defects in the report of the commissioners.

Judgment affirmed.

Filed Feb. 23, 1892.

No. 16,388.

WOOD v. THE STATE, EX REL. DODSON.

OFFICE AND OFFICER.—*Holding Two Offices at Same Time.*—One can not legally hold the office of school trustee of an incorporated town and the lucrative office of postmaster at the same time.

SAME.—*Quo Warranto.*—*Demand for Surrender of Office not Necessary.*—Under the second subdivision of section 1131, R. S. 1881, to entitle one claiming an office held by another to a judgment of ouster, no demand for a surrender of the office is necessary.

PRACTICE.—*Special Denial.*—*Sustaining Demurrer Thereto.*—It is not error to sustain a demurrer to a special denial where the evidence admissible thereunder is admissible under the general denial already in, and the same defence can be made under the general denial as under the special denial.

SAME.—*Objections to Evidence not Raised Below.*—Objections to evidence, not made when it was introduced, will not be considered on appeal.

JUDGMENT.—*Greater Relief Granted than Party is Entitled to.*—*Waiver.*—Where a party is entitled to a judgment in his favor, but is granted greater relief than he is entitled to under the evidence, the judgment will not be disturbed in the absence of a motion to modify it.

From the Lawrence Circuit Court.

J. H. Willard and W. H. H. Edwards, for appellant.

N. Crooke and M. Owen, for appellee.

OLDS, J.—The appellant was elected school trustee and president of the school board of the school town of Mitchell, in Lawrence county, Indiana, on the 6th day of September, 1890. At that time, and ever since, said appellant has been and was holding the office of postmaster at the said town of Mitchell, a lucrative office, retaining and holding the of-

130 364
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office of postmaster, the appellant filed his bond and qualified as president of the school board, and took possession of the office. On the 7th day of May, 1891, the board of trustees of said town proceeded to and did elect the relator school trustee, and he was duly elected president of the school board of the said school town of Mitchell, and the relator brings this action to oust the appellant and recover a judgment of ouster in the court below. The judgment goes further than to merely oust the appellant, and gives the relator the office, but no objection is raised to the form of the judgment. If the relator was entitled to a judgment in his favor, but he is given more by the judgment than he is entitled to, the judgment can not be disturbed, as no motion was made to modify the judgment, and no question is presented as to its form.

The first question discussed is the sufficiency of the complaint.

We have examined the complaint, and do not deem it necessary to set it out.

The complaint is clearly sufficient to withstand a demurrer. The action is properly prosecuted under the second subdivision of section 1131, R. S. 1881, to oust the appellant, and its averments are sufficient to make it good under that section. It is contended that there is no averment showing the holding of a legal office by the relator or the appellant, that it is designated as the office of school trustee of said town of Mitchell. This objection is not well taken. The office is clearly designated. There can be no mistake about the office in controversy being the office of school trustee and president of the school board of the school town of Mitchell. In other words, it is clear from the averments of the complaint that the relator was elected school trustee of the school town of Mitchell by the trustees of the town of Mitchell, and that he was elected president of the school board, and gave bond and qualified as such, and that the appellant was holding the same office and exercising the functions thereof. The pleading is not as explicit as it ought to be, but it is not

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subject to a demurrer on this account. It is further urged that the pleader has stated conclusions instead of facts. This objection is not well taken.

It is next urged that the court erred in sustaining a demurrer to the second paragraph of appellant's answer, the first being a general denial. All the evidence that could have been introduced under this paragraph was admissible under the general denial, and the same defence could be made under the general denial as under this paragraph. It is a mere special denial of facts. While the proper practice would have been to have addressed to it a motion to strike it out, which should have been sustained, yet no error was committed by sustaining a demurrer to it.

It is further contended that the finding of the court is not sustained by sufficient evidence. It is urged that no demand was proven. To entitle the appellee to a judgment of ouster under the second subdivision of section 1131, no demand was necessary, and if the evidence entitled the appellee to some judgment in his favor it can not be set aside because the court gave too large a judgment, there having been no motion to modify. If the court granted the appellee greater relief than he was entitled to under the evidence, and the appellant desired to avoid that portion of the judgment not sustained by the evidence, he should have moved to modify the judgment.

Counsel for appellant discuss an alleged error in the admission of evidence, but the objection to the evidence discussed by counsel was not made to the evidence when introduced.

Counsel for appellant concede that the appellant holds both offices, and that he is entitled to hold but one of them, but contend that relator has not shown by legitimate evidence that he is entitled to the office of school trustee, and appellant seeks to defeat the action on that ground. *Chambers v. State, ex rel.*, 127 Ind. 365; *Foltz v. Kerlin*, 105 Ind. 221. There is but little merit in the appeal.

The Erwin Lane Paper Company *et al.* v. The Farmers' National Bank.

The case appears to have been fairly tried and determined on its merits in the court below, and there was no such error committed as should reverse the judgment.

Judgment affirmed, with costs.

Filed Feb. 19, 1892.

No. 15,437.

THE ERWIN LANE PAPER COMPANY ET AL. v. THE FARMERS' NATIONAL BANK OF CONSTANTINE, MICHIGAN.

PROMISSORY NOTE.—*Payable to Cashier of Bank.—Right of Bank to Sue.*—A note payable to the cashier of a bank is to be deemed payable to the bank, and the bank may sue thereon as payee.

From the Elkhart Circuit Court.

H. C. Dodge and J. S. Dodge, for appellants.

— *Howell*, — *Carr* and — *Barnard*, for appellees.

MILLER, J.—The only question discussed in the briefs of counsel is the sufficiency of the complaint, which has been challenged for the first time in this court.

This was an action by the appellee against the appellants upon a promissory note made payable to "Charles H. Barry, Jr., cashier of the Farmers' National Bank of Constantine." The complaint declares upon the note as being made payable to the bank.

The only objection urged to the sufficiency of the complaint is that the note is payable to Barry, and not to the bank.

A note payable to the cashier of a bank is to be deemed payable to the bank, and the bank may sue thereon as payee. *Nave v. Hadley*, 74 Ind. 155, and cases cited.

Judgment affirmed.

Filed Feb. 24, 1892.

The Indiana, Illinois and Iowa Railroad Company v. Larrew.

No. 14,512.

**THE INDIANA, ILLINOIS AND IOWA RAILROAD COMPANY
v. LARREW.**

RAILROAD.—Construction of.—Laborer's Lien.—Payment to Contractor Constitutes no Defence.—A laborer who does work in the construction of a railroad, and gives the notice required by the statute, is entitled to a lien. Where the notice is given in due time and manner, payment to the contractor will not defeat his rights.

PRACTICE.—Proof of Answer Stating no Defence.—Effect.—Proof of a bad answer will not entitle a defendant to judgment where the answer does not state any defence. If there is an absolute failure to state facts constituting a defence, evidence sustaining such an answer will not avail.

SAME.—Failure to Demur.—Waiver.—If there is not an utter failure to state a defence the objections are waived by the failure to demur, but where there is no defence at all pleaded the question is one of evidence, and the appellate tribunal decides it as a question of evidence, not as one of pleading.

From the Starke Circuit Court.

A. I. Gould and G. A. Murphy, for appellant.

G. W. Beeman, for appellee.

ELLIOTT, C. J.—The appellee seeks, by his complaint, a recovery for work performed by him in the construction of the line of railroad owned by the appellant, and to enforce a lien under the statute. The appellant, in its third paragraph of answer, alleged that the part of its road upon which work was done by the appellee was constructed under a contract with Joseph Shaw and Frank Robinson; that the work was completed by the contractors on the 20th day of October, 1886; that the appellee was employed by the contractors, and that the appellant paid its contractors in full. To this answer the appellee unsuccessfully demurred. The court tried the case, and, over a motion for a new trial, gave the appellee judgment. The appellant assigns as error the ruling denying a new trial, and the appellee assigns cross-error upon the ruling on the demurrer to the answer.

The answer was clearly bad, and the court erred in over-

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ruling the appellee's demurrer. A laborer who does work in the construction of a railroad, and gives the notice required by the statute, is entitled to a lien. Where the notice is given in due time and manner, payment to the contractor will not defeat his rights. *Elliott's Supp.*, section 1710; *Farmers, etc., Co. v. Canada, etc., R. W. Co.*, 127 Ind. 250; *Midland R. W. Co. v. Wilcox*, 122 Ind. 84. The cross-error is, therefore, well assigned.

It is insisted by the appellant's counsel that as the answer was proved the appeal must for that reason prevail. But we can not agree that it is true in all cases that proof of a bad answer entitles a defendant to judgment even where there is no demurrer to the answer. The sounder doctrine, and that sustained by the better reasoned cases is, that proof of a bad answer will not entitle a defendant to judgment where the answer does not state any defence. If there is an absolute failure to state facts constituting a defence, evidence sustaining such an answer will not avail; but it is otherwise where there is a defence defectively stated. *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86; *Western Union, etc., Co. v. Fenton*, 52 Ind. 1.

If there is not an utter failure to state a defence, the objections are waived by the failure to demur, for it is an elementary principle of procedure that questions can not be first made on appeal. But where there is no defence at all pleaded, the question is one of evidence, and the appellate tribunal decides it as a question of evidence, not as one of pleading. In this instance we are far within the rule in holding that there is no error available to the appellant, for the answer was demurred to, and cross-error is assigned upon the decision of the court overruling the demurrer. As the evidence wholly failed to establish a defence, the finding of the court was right.

Judgment affirmed.

Filed Feb. 25, 1892.

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No. 15,668.

MYERS ET AL. v. O'NEAL ET AL.

JUDICIAL SALE.—Liens on Land Sold.—Assumption of.—In the absence of an assumption of, or agreement to pay, existing liens, land sold at a judicial sale remains the primary fund for the payment of the encumbrances thereon, to the extent of its value and in the order of their seniority.

SAME.—Purchaser not Liable for Liens on Land Purchased.—A purchaser at a judicial sale is not, by the mere fact of his purchase, liable to pay the debts secured by liens on the land purchased.

SAME.—Purchaser Buying in Liens and Causing Sale Thereon.—Title as Against Junior Lien-Holder.—A purchaser of land at a judicial sale may cause said land to be sold on a prior lien that he has acquired, and obtain a valid title to said land by purchase at such sale as against a junior lien-holder.

From the Daviess Circuit Court.

A. J. Padgett, A. Paget, W. R. Gardiner, S. H. Taylor,
and *C. G. Gardiner*, for appellants.

J. H. O'Neal, for appellees.

MILLER, J.—This was an action brought by the appellants against the appellees. The first paragraph is in ejectment for the whole of the tract of real estate in controversy. The second claims that the plaintiffs own the undivided two-thirds and the defendants the one-third, but that defendants wrongfully claim the whole title, and asks that the title of the plaintiffs to the two-thirds be quieted. The third paragraph is for the partition of the land.

The defendants answered the complaint by a general denial. A trial was had by the court, and a special finding of facts made upon request, and upon the special finding of facts the court stated its conclusions of law, and found for the defendants upon each paragraph of complaint. To these findings appellants excepted, and brought this appeal, assigning as error that the court erred in its conclusion of law upon the facts found.

The facts found by the court that we deem necessary to

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present the question of law that must control the decision of this case are as follows :

In the year 1869 one Bott became the owner, by a single conveyance, of two parcels of real estate. Part of the purchase-money was paid, and a note and mortgage executed on all the property for the residue.

Subsequently Bott became financially embarrassed, and his property covered by mortgages and judgments, and he was, eventually, adjudged a bankrupt.

The parties to this action each claim title to one of these parcels of real estate growing out of certain judicial sales.

The appellee John H. O'Neal, from time to time, became the accommodation surety of Bott for a considerable amount, and was in part indemnified by a mortgage on both parcels of land.

On the 24th day of November, 1877, the property was sold by the assignee of Bott to the appellee John H. O'Neal, for the sum of twenty dollars, "subject to all liens and encumbrances upon and against said lots."

At that time the lots were worth in the aggregate not to exceed the sum of \$7,600, which, if we deduct the one-third interest of the wife of Bott, which vested at the sale, left the net value of the property \$5,067.

The property was encumbered, counting interest to November 24, 1877, and not including costs, in the sum of \$16,716.38. This encumbrance may conveniently be classified as follows :

Total liens senior to appellants' judgments . . .	\$10,841 74
Appellants' judgments	353 10
Judgments junior to appellants'	5,521 54
Total	\$16,716 38

After purchasing the property at the sale by the assignee in bankruptcy, O'Neal proceeded in a diligent way to control all liens older than a mortgage resting upon one of the parcels of real estate, the collection of which was necessary

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to protect his interests. Having purchased and taken assignments of certain of the senior judgments, he caused executions to issue, and became the purchaser of the property at sheriff's sales, and subsequently acquired sheriff's deeds on these purchases.

After O'Neal acquired title, the wife of Bott instituted an action in partition against him for the recovery of her one-third interest, which resulted in a decree in her favor, and a sale of the property, by a commissioner in partition, to one Donaldson, who subsequently assigned the certificate of purchase to O'Neal, who in due time received a commissioner's deed.

The appellees, other than John H. O'Neal, hold by conveyances from him.

On the 12th day of August, 1878, the appellants caused executions to issue on their judgments, and on the 14th day of September, 1878, they purchased the property in dispute at sheriff's sale for \$422.95, and on September 15th, 1879, they procured a sheriff's deed for the property.

The appellee had his deeds recorded in due time, but the appellants neglected to have their sheriff's deed recorded until April 1st, 1889, more than ten years after their purchase.

The appellants claim that by the sale made by the assignee in bankruptcy the legal title vested in the purchaser subject to, and charged with, the payment of the liens and encumbrances thereon; that O'Neal, having purchased the property at judicial sale, subject to encumbrances, is presumed to have deducted the amount of all prior encumbrances from the purchase-price; and that, when he purchased and took assignments of the senior liens, he simply paid part of the purchase-money; that the title acquired under the sheriff's sale became merged in the fee simple which he then held.

The appellants further claim that as a result of this the appellants under their purchase at sheriff's sale acquired title

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to the undivided two-thirds of the property, freed from all prior claims of ownership on the part of the appellees.

In support of this proposition the cases of *Bunch v. Grave*, 111 Ind. 351, *Montgomery v. Vickery*, 110 Ind. 211, *Hancock v. Fleming*, 103 Ind. 533, *Birke v. Abbott*, 103 Ind. 1, *Atherton v. Toney*, 43 Ind. 211, and *Shuler v. Hardin*, 25 Ind. 386, are cited and relied upon.

Some of the language employed in the opinions in these cases fully sustains the contention of the appellants. Without stopping to inquire whether the language used in some of these cases may not have been broader than was necessary in disposing of the cases then before the court, and broader than can be sustained by the weight of decided cases, we are of the opinion that, in any event, they are not decisive of the case now in hand.

While it may be the general rule that the amount bid for property at execution sale will be presumed to be the price or value of the property, less the amount of the encumbrances, the presumption is not conclusive or without exceptions. For instance, in the case under consideration, where the amount of the encumbrance is more than three times the value of the encumbered property, the presumption would be a violent one. *McClain v. Weise*, 22 Ill. App. 272. If the law was as it is claimed by the appellants to be, no one would purchase the equity of redemption in lands covered with liens exceeding the value of the property.

We are of the opinion that, in such case, in the absence of an assumption of, or agreement to pay, existing liens, the land will remain the primary fund for the payment of the encumbrances to the extent of its value, and in the order of their seniority.

The purchaser of the equity of redemption differs from an original encumbrancer in this, that he is under no personal obligation to pay the debts secured by the liens, because they are not his debts. Lien-holders have no standing

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to ask him to place them in a better position than they occupied before his purchase.

Where the amount of encumbrance considerably exceeds the value of the property purchased, the purchaser can not perfect his title and relieve it of encumbrances, by their payment, without paying more than the property is worth, and thus paying encumbrances that were, prior to his purchase, practically worthless. This the law ought not to compel him to do, as it would be inequitable and contrary to public policy, and would tend to impair the sale on execution of the equity of redemption of encumbered estates.

We see no reason why a purchaser of the equity of redemption in such case may not, as against the holder of junior encumbrances, protect and perfect his title by acquiring outstanding encumbrances, and causing sales to be made thereunder, just as a stranger might do, this being the most practical method of perfecting the title without placing the junior encumbrances in any worse position than they occupied before the sale.

If the facts in any particular case rebut the presumption that the pre-existing encumbrances entered into and formed a part of the consideration of the purchase, then the purchaser is under no obligation, legal or equitable, to the holders of the encumbrances to pay them.

In this case the special findings show that the appellee John H. O'Neal had, prior to the time of his purchase of the property at the sale by the assignee in bankruptcy, interests in the premises in controversy which impelled him to protect the property from being wasted in costs and sacrificed at sheriff's sales, and to either acquire the complete title to the property, or make it bring enough to protect his indemnifying mortgage. The fact that he took an assignment of the judgments, instead of having them satisfied of record, is some evidence of an intention to keep them alive.

There can be no doubt but that it was to his interest to keep them alive, or procure sales and sheriff's deed, in order

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to prevent the appellants or other judgment creditors from acquiring title under their junior liens. All these circumstances conspired to prevent a merger of the title acquired under his sheriff's deed, with that conveyed to him by the assignee in bankruptcy.

A succinct statement of the law on this subject is contained in 2 Pom. Eq. Jur., and is as follows :

"Section 798. *Owner who is not liable for the debt pays off the mortgage.* On the other hand, when an owner of the premises who is not personally and primarily liable to pay the debt secured pays off a mortgage or other charge upon it, he *may* keep the lien alive as a security for himself against other encumbrances or titles, and thus prevent a merger. Whether he does so is a question of intention governed by the rules laid down in the previous paragraphs. When it is evidently for his benefit, the intention will be presumed. He may thus be entitled to preserve the lien, even without a formal assignment of the security to himself. Among those who are thus regarded as equitable assignees are grantees of the mortgagor not having assumed payment of the mortgage, heirs, devisees, and in fact all parties entitled to redeem, and not personally liable as principal debtors."

To the same effect may be cited *Hanlon v. Doherty*, 109 Ind. 37; 1 Jones Mort., Chap. 20, part 1, section 848 to 873.

This case affords a strong illustration of the rule that equity will not permit titles to merge where it would be inequitable to do so. The appellants, whose claims, because of the prior encumbrance resting upon the property, were practically worthless, are in no condition to ask that the doctrine of merger shall be applied in order to work a practical confiscation of the superior property rights of the appellees.

The conclusion we have arrived at renders it unnecessary to inquire whether the title acquired by the appellee O'Neal

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at the sheriff's sale merged in the title conveyed to him by the assignee, or the title acquired under the assignee's sale merged in the title received at sheriff's sale, which becomes, by relation back to the dates of the judgments, the superior title. *Shanklin v. Franklin Life Ins. Co.*, 77 Ind. 268; *Smith v. Allen*, 1 Blackf. 22; *Doe v. Horn*, 1 Ind. 363; *Bellows v. McGinnis*, 17 Ind. 64; *Ashley v. Eberts*, 22 Ind. 55.

Judgment affirmed.

Filed Feb. 25, 1892.

No. 15,244.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO
RAILWAY COMPANY v. DARLING.

NEGLIGENCE.—Contributory Negligence.—Averment that Plaintiff was Free from.—Effect.—An averment in the complaint, in an action for negligence, that the plaintiff was without fault or negligence which contributed to his injury is sufficient, unless it is overcome by the specific averments of the complaint, showing, notwithstanding, that he was guilty of contributory negligence.

VERDICT.—Directing, when Evidence is Conflicting.—Where the evidence relating to any material question of fact is conflicting, the court can not, as to such question, direct a verdict.

SAME.—Evidence Equivocal.—Where the evidence, although uncontradicted, is equivocal in its character, and is fairly susceptible of two interpretations, one tending to support the claims of plaintiff and the other of the defendant, the court can not direct the verdict.

PRACTICE.—Interrogatories.—Verdict Shown to be Based on Bad Paragraph.—If it affirmatively appears from the interrogatories that the verdict is in part based upon an insufficient paragraph of complaint, it is a sufficient cause for a new trial, being "contrary to law."

SAME.—Verdict in Part Based on Bad Paragraph.—One Paragraph in Part Unsupported by Evidence.—A verdict which is in part based on a bad paragraph of complaint, or which the record shows is in part based upon a paragraph of complaint which is wholly unsupported by the evidence, can not stand.

From the Ohio Circuit Court.

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130 376
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The Cincinnati, Indianapolis, St. Louis and Chicago R'y Co. v. Darling.

J. T. Dye, W. H. Dye and J. K. Thompson, for appellant.
O. F. Roberts, N. S. Givan and M. J. Givan, for appellee.

McBRIDE, J.—The appellee was a day laborer, employed by the appellant to shovel dirt and gravel on its track. While riding on a tender to an engine, going from Lawrenceburgh to the place where he was employed to work, the engine collided with another engine, coming from the opposite direction, drawing a train of cars, and the appellee was hurt. He brought this suit to recover damages for his injuries, which he alleged were caused by the actionable negligence of the appellant.

While the appellant has assigned many errors, and has argued several, we find it only necessary to consider two of the questions presented. The court overruled separate demurrers to each paragraph of the complaint. The jury, by answers to interrogatories, show that their general verdict is based upon the first, third and fourth paragraphs of the complaint, and the appellant insists that these paragraphs were all bad, and that the court erred in its rulings upon the demurrers. But one objection is pointed out, and this is common to the three paragraphs. All show that the appellee was, as above stated, riding upon the tender to an engine, for the purpose of reaching his place of work.

The first paragraph avers that he was "ordered and directed by the defendant" to get upon the engine to ride, and that he did so, and sat down upon the tender attached to the engine, with his back to the engine.

The third paragraph avers that he was "requested and directed" by the defendant to get upon the engine to ride to his place of work, and the fourth, that when hurt he was "being taken, on an engine, by said defendant" from his home to his place of work.

The objection to the complaint, as stated by counsel for the appellant in their brief, is as follows:

"This shows that plaintiff was not a passenger; he had

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no duties to perform on this engine, or in connection with it. It does not show that the company was under any obligation to carry him from his home to the place of his work, or that there was any reason why he should not have walked. It does show that he got aboard of the engine and sat down on the tender attached to the engine, with his back to the engine, to be taken to his place of work. He took a position of obvious peril, and turned his back in the direction from which danger was to be apprehended. The complaint shows 'his injury was the result of his own recklessness and folly. He was himself the author of his misfortune.' "

Without considering the effect of the averments that the appellee was riding on the engine by the direction or command of the appellant, it is enough to say of each of these paragraphs that each contained the averment that the plaintiff was himself without fault or negligence which contributed to his injury. This was sufficient, unless it was overcome by the specific averments of the complaint, showing, notwithstanding, that he was guilty of contributory negligence. We can not say that the mere averments that he was riding on the engine, or on the tender, or that he was riding with his back to the engine, were any or all of them sufficient to overcome the general averment of freedom from fault. We think the court did not err in overruling the demurrers.

We quote from the first paragraph of the complaint all of its averments charging negligence upon the part of the appellant: "That said defendant carelessly, negligently and recklessly managed the business of said defendant in running, or operating and managing, the engines, locomotives and cars on said defendant's road; that said defendant, on the day and year aforesaid, carelessly, negligently and recklessly ran an extra train, called a cattle train, from Cincinnati to the city of Lawrenceburgh, and that said defendant failed and neglected to give notice to its said servants in charge of the engine on which said plaintiff was seated of

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said extra train being sent from Cincinnati to the city of Lawrenceburgh over the track of said defendant, and that before said cattle train reached the city of Lawrenceburgh said defendant also started said engine, on which said plaintiff was seated, to the point, or place, between Lawrenceburgh Junction and Lawrenceburgh City, where said plaintiff was to work for said defendant on its said track, and that by reason of the careless, negligent and reckless operating and running of said train and engine as aforesaid, said train and said engine on which said plaintiff was seated collided and run into each other with great force, and by reason thereof," etc.

It will be observed that the negligence charged is that the appellant started the "cattle train" and the engine in question toward each other, over the same track, without notice to the employees operating them.

The engine on which the appellee was riding was known as "No. 63," and was operated by one Mahan as engineer and one Dugan as conductor. The train with which it collided was known as "Extra 59." On the trial the evidence showed, without contradiction, that before engine No. 63 started, Conductor Dugan received an order reading as follows:

"To Dugan and Engineers, Lawrenceburgh: Engines 63 and 68 will run from Lawrenceburgh to Valley Junction. Keep clear of extra 59 west. No. 2 will run 40 minutes late from Lawrenceburgh Junction to Valley Junction. Cook. 6:21 A. M. O. K. Dugan."

Cook was the appellant's train dispatcher, Dugan, after reading the order, handed it to Mahan and told him to start. Mahan, without reading the order, did start his engine, and had only gone a short distance when the collision occurred. Mahan was reading the order when he discovered the approaching train.

The conductor testified that if he had obeyed the order, he would have remained on the side track, instead of starting out. Mahan testified that if he had read the order before

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starting he would not have started. Both agreed in testifying that under the order it was their duty to have remained on the side track.

The court instructed the jury as to this paragraph of complaint as follows :

"As to this paragraph there is no conflict of evidence, the plaintiff having himself introduced in evidence the notice given by the defendant to the employees in charge of the engine on which the plaintiff was, and as to this paragraph I charge you your finding must be for the defendant."

As above stated, the jury, in their answers to interrogatories, say the verdict is based upon the first, third and fourth paragraphs of the complaint, thus disregarding the charge of the court.

The appellee's contention, in substance, is, that the order sent by the train dispatcher was not sufficiently explicit, and was, as a direction to the engineer and fireman in charge of engine No. 63, so uncertain and indefinite that it was no notice, and that the jury had the right to construe and interpret it themselves, regardless of the court's instructions.

Where the evidence relating to any material question of fact is conflicting, the court can not, as to such question, direct a verdict. The jury must settle the conflict. *Messick v. Midland R. W. Co.*, 128 Ind. 81, and authorities there cited.

We think this is the correct rule when the evidence, although uncontradicted, is equivocal in its character, and is fairly susceptible of two interpretations, one tending to support the claims of one party, and the other tending to support the claims of the other party. The jury, as judges of the facts, must weigh and construe the testimony and solve the uncertainty. In such a case, it would be error for the court to direct a verdict, and if the jury should make a finding in disregard of the instruction, this court would not, on that ground, set the verdict aside.

While the rule contended for by the appellee is correct,

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however, we do not think it applies in the case at bar. Whatever there may be of apparent uncertainty in the order of the train dispatcher disappears in the light of the testimony of the engineer and conductor to whom it was addressed.

In our opinion the instruction in question was fully justified by the evidence. There was no conflict in the evidence so far as that paragraph was concerned. The evidence not only failed to sustain it, but disproved it, and the court did not err in directing the jury to find for the defendant on the issue thus made.

The jury had no right to disregard the instruction. As it affirmatively appears that the verdict is in part based upon the first paragraph of complaint, it is "contrary to law," and the objection is properly made by the motion for a new trial upon that ground.

It has been frequently decided that a verdict which is in part based on a paragraph of complaint which is bad can not stand. *Wolf v. Schofield*, 38 Ind. 175; *Bailey v. Troxell*, 43 Ind. 432; *Peery v. Greensburgh, etc., T. P. Co.*, 43 Ind. 321; *Cook v. Hopkins*, 66 Ind. 208; *Schafer v. State, ex rel.*, 49 Ind. 460; *Evansville, etc., Co. v. Wildman*, 63 Ind. 370.

And, upon the same principle, a verdict, which the record affirmatively shows is based in part upon a paragraph of complaint which is wholly unsupported by evidence can not stand.

We refrain from the expression of any opinion upon the question suggested relative to co-employees, because in our opinion the case does not require it.

While several other questions are presented and argued, we think it unnecessary to pass upon them.

Judgment reversed, with costs.

Filed Feb. 25, 1892.

 Reinken v. Fuehring et al.

No. 16,447.

REINKEN v. FUEHRING ET AL.

 180 382
 155 241

MUNICIPAL CORPORATION.—Cleaning Streets.—Assessment Against Abutting Property-Owners a Local Assessment, Not a Tax.—Under the provision of the charter of the city of Indianapolis (Acts 1891, p. 137) which authorizes the city to contract for sprinkling and sweeping the streets at the cost of the property-holders abutting on such streets, an assessment made against an owner of property along a street required to be swept, to pay the expense of such sweeping, is not a tax, but a local assessment, and does not fall within the constitutional provision requiring an equal and uniform rate of taxation.

SAME.—Police Power.—As the general public has an interest in keeping the streets clean, the city may, in the exercise of the police power conferred upon it by the State, order them swept, and as the abutting property-owner derives a benefit from such sweeping not enjoyed by the general public, he may be required, by assessment, to pay the expense of such sweeping; and such assessment does not amount to a taking of private property without compensation and without due process of law.

SAME.—General Tax.—As the property-owner is fully compensated for his outlay in the enhanced value of his property, he may be taxed generally also with the remainder of the public for cleaning other streets in which the public alone have an interest.

SAME.—Sweeping Street Crossing.—The fact that the statute contemplates the sweeping of the crossings does not render it invalid, as it can not be said that the property-owners do not receive a special benefit from keeping them clean.

From the Marion Circuit Court.

C. S. Denny and W. F. Elliott, for appellant.

A. L. Mason, for appellees.

COFFEY, J.—The appellees brought this suit in the Marion County Circuit Court to foreclose a lien for the amount assessed against the appellant's real estate for sweeping the street in front of his property in the city of Indianapolis, under a contract made between the city and the appellees pursuant to the provisions of the city charter. A demurrer to the complaint was overruled, and the appellees had judgment, from which this appeal is prosecuted.

The charter of the city of Indianapolis is found in the

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acts of the General Assembly of 1891, page 137. It provides for the mode of improving the streets and the payment for such improvements, and confers on the city, through its proper officers, the power to make contracts for sprinkling and sweeping such streets, in the city, as it may deem proper, and to assess against the property-holders abutting on such streets the cost of such sprinkling and sweeping. The only question before us for decision relates to the constitutionality of so much of the act as authorizes the city to contract for sprinkling and sweeping the streets at the cost of the property-holders along the line of such streets, it being contended by the appellant that these provisions are unconstitutional for the reasons:

First. That it violates the provisions of our State Constitution requiring an equal and uniform rate of taxation.

Second. Because, even if the city has power to compel abutting property-owners to pay for sweeping the streets in front of their property, it has no power to compel them to do so, and, at the same time, compel them to pay into the general fund a part of the cost of cleaning other streets as provided for in the act.

Third. Because the proceeding which the act attempts to authorize amounts to a taking of private property without due compensation and due process of law.

To support his contention as to the first proposition presented, the appellant relies, to some extent, upon the case of *Gridley v. City of Bloomington*, 88 Ill. 554, and the case of *City of Chicago v. O'Brien*, 111 Ill. 532. These cases hold that an ordinance making it the duty of the owner or person occupying premises abutting upon a street to keep the sidewalks free from snow and ice, and providing for the enforcement of such ordinance by the infliction of penalties, is void. The cases seem to rest, principally, upon the peculiarity of the laws of the State of Illinois, under which the lot-owner does not own the fee in the street. The last

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case, however, was decided by a divided court, three of the judges refusing to concur in the conclusion reached.

The authorities make a clear distinction between the word "taxation" and the word "assessment." "'Taxes' are impositions for purposes of general revenue; 'assessments' are 'special and local impositions upon property in the immediate vicinity' of an improvement for the public welfare, 'which are necessary to pay for the improvement, and laid with reference to the special benefits which such property derives from the expenditure.'" *Palmer v. Stumph*, 29 Ind. 329.

This distinction is recognized in nearly all the States of the Union. For a collection of the authorities upon this subject see the case above cited.

The assessment, therefore, made against the owners of property along the streets required to be swept, under the act in question, to pay the expense of such sweeping, is not a tax, but a local assessment.

The question is then presented as to whether a local assessment for this purpose can be sustained under our Constitution?

If it can be sustained at all, it must be upon the ground that it is the proper exercise of the police power of the State, and a special benefit to the abutting property-owner.

The power of a municipal corporation to order sidewalks of a particular kind, and to assess against the abutting property-owner an amount necessary to pay for the same, and to pay for keeping the same in repair and proper condition for the use of the public, is generally upheld upon the ground that it is proper exercise of the police power of the State. *Goddard, Petitioner, etc.*, 16 Pick. 504; *Palmer v. Way*, 6 Col. 106; *Cooley Taxation*, pp. 396-7; *State, etc., v. Mayor, etc.*, 8 Vroom, 415; *Kirlby v. Boylston*, 14 Gray, 249; *Pedrick v. Bailey*, 12 Gray, 161; *Moore v. Gadsden*, 93 N. Y. 12; *Hartford v. Talcott*, 48 Conn. 525.

Judge Cooley says: "The cases of assessments for the

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construction of walks by the side of the streets, in cities and other populous places, are more distinctly referable to the power of police. These foot-walks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order the walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and in case of their failure so to construct them, to provide it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is the law the duty must be looked upon as being enjoined as a regulation of police, because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a condition suitable for use." *Cooley Taxation, supra.*

Assuming, as held by these authorities, that the power to make local assessments to pay for local improvements or benefits is to be referred to the police power of the State, we are naturally led to inquire whether the assessments provided for in the charter now under consideration amount to a taking of private property without compensation and without due process of law as contended by the appellant.

Mr. Sedgwick, in his valuable work on Statutory and Constitutional Law, 434, says: "The clause prohibiting the taking of private property without compensation, is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the Legislature may make police regulations, although they may interfere

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with the full enjoyment of private property, and though no compensation is given."

Judge Dillon, in his work on Municipal Corporations, Vol. 1, 212, says: "Every citizen holds his property subject to the proper exercise of this (police) power, either by the State Legislature directly, or by public or municipal corporations to which the Legislature may delegate it. * * * It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. * * * If he suffers injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

In the case of *Goddard, petitioner, etc., supra*, in speaking of an ordinance which required the abutting property-owners to keep the sidewalks free from snow and ice, the Supreme Court of Massachusetts said: "But we think it is rather to be regarded as a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class. * * * Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar door and steps, a passage for fuel, and the passage to and from his own house to the street. * * * For his own accommodation he would have an interest in cleaning the snow from

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his own door. The owners and occupiers of house-lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community."

The case of *Village of Carthage v. Frederick*, 122 N. Y. 268, involved the validity of an ordinance which required the owners of abutting property to keep the sidewalks adjacent to their property free from snow and ice at their own expense, and after a careful review of some of the authorities above cited, the Court of Appeals reached the conclusion that the ordinance was valid as a reasonable exercise of the police power of the State.

The principles which rule the cases above cited can not, in our opinion, be distinguished from the principles which rule the case at bar. Of course, it is not claimed that in the exercise of the police power such assessments could be made and collected from the abutting property-owner unless he had a special interest and derived a special benefit therefrom not enjoyed by the public in general, but if he has a special interest in the improvement of the street and sidewalk, and in keeping them free from snow and ice, so he has a special interest in keeping them free from accumulating filth. It is matter of common observation, of which we must take notice, that property located upon well improved streets, kept clean, is more desirable than property on unimproved streets where mud and filth are permitted to accumulate and obstruct their use. It is safe to assert, we think, that keeping a street clean adds to the rental, if not to the permanent value of property located thereon; and for this reason, among others, the abutting property-owner has a special interest in such cleaning not enjoyed by the general community. For the reason that the public in general has an interest in keeping the streets free from filth, the city may, in exercising the police power conferred upon it by the State, order them swept, and for the further reason that the abutting property-owner derives a benefit from such sweeping not en-

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joyed by the general public he may be required, by assessments, to pay the expenses incident to such sweeping.

It follows from what we have said that the assessments provided for by the act under consideration do not amount to a taking of private property without compensation and without due process of law.

Assessments of the kind we are now considering are made upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they can be sustained.

If the property-owner is fully compensated for his outlay in the enhanced value of his property, we see no reason why he may not be taxed generally also with the balance of the public for cleaning other streets in which the public alone have an interest, and which are not, and, indeed, can not be swept as the streets upon which his property abuts. We are not able to perceive how such a tax would be unjust or inequitable, inasmuch as he receives as much benefit therefrom, in contemplation of law, as any other member of the community. As he has been fully compensated for his outlay in sweeping the street upon which his property is situated, he should not be heard to complain of such payment when called upon to bear his portion of other public burdens.

Nor do we think the fact that the statute contemplates the sweeping of the crossings renders it invalid. It can not be said that the property-owners do not receive a special benefit from keeping them clean. Sweeping the street in front of the property would be of little benefit if filth and rubbish were permitted to accumulate upon the crossings, so as to render them unfit for use. If the property does in fact receive a special benefit from sweeping the crossings, there is no reason why those who are thus benefited should not pay the expense

Having carefully examined all the objections urged against

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the validity of so much of the statute as is here called in question, we have reached the conclusion that it is not unconstitutional, and that the court did not therefore err in overruling a demurrer to the complaint before us.

Judgment affirmed.

ELLIOTT, J., took no part in the decision of this cause.

Filed Feb. 24, 1892.

No. 15,947.

THE SEYMOUR WOOLLEN FACTORY COMPANY v. BRODHECKER, TREASURER.

BILL OF EXCEPTIONS.—*Objection.*—*Motion to Strike Out.*—On objection made in the brief of counsel the Supreme Court will refuse to consider a bill of exceptions, or parts of a bill, not properly in the record, and a motion to strike out the bill is unnecessary.

SAME.—*Written Instruments, How Made Part of.*—Written instruments may be brought into a bill of exceptions by reference, but in order to bring them into the bill in that mode the instruments must appear to have been offered in evidence, they must be clearly identified by the judge, and the place for their insertion must be clearly indicated by the words "here insert." The judge can not delegate to the clerk, to the stenographer, or to any one else the authority to put a written instrument into a bill of exceptions.

SAME.—*Attempted Incorporation of Written Instrument by Reference.*—Where a bill of exceptions, by the words "here insert," indicated the place for the insertion of an order of the board of equalization in the auditor's office, and the order was copied into the bill by the clerk after it was signed by the judge, such order did not become part of the record.

From the Jackson Circuit Court.

O. H. Montgomery, for appellant.

B. H. Burrell, for appellee.

MILLER, J.—This was a proceeding instituted to enjoin the collection of taxes claimed to have been unlawfully assessed on the capital stock of the appellant by the board of equalization of Jackson county.

The error assigned in this court calls in question the action of the court below in overruling the motion for a new trial.

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131	421
130	389
135	225
136	474
130	389
142	441
130	389
145	254

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The causes for which a new trial was asked were :

"1. Because the decision of the court is not sustained by sufficient evidence.

"2. Because the decision of the court is contrary to law."

The appellee has filed a motion to strike out the bill of exceptions, by which the evidence given on the trial is brought into the record, and has submitted a brief in support of the motion.

Without the evidence in the record no question is presented for our consideration. We, therefore, proceed to determine from the record, as it comes to us, the question presented by the motion.

We find in the bill of exceptions, and following a portion of the evidence, the following statement :

"(Here insert full order of the board of equalization, O. B. 15, page 281)."

Immediately following the entry there appears in the record what purports to be the proceedings of the county board of equalization of Jackson county for the year 1889.

The bill of exceptions, at the conclusion of the evidence, states that "the foregoing was all the evidence given in the cause ;" and the clerk of the court, in his authentication of the transcript, certified that the "foregoing is a full, true and complete copy of all the proceedings, orders, judgment and files in the above cause, as appears of record and on file now in my office, *together with a true copy of the entry on page 281 of Commissioners' Record No. 15, of the commissioners' records of said county.*"

We think it apparent that the evidence was not written out in full and inserted bodily in the bill of exceptions prior to the time the same was signed by the judge and filed in the clerk's office, as required by the uniform rulings of this court. *Collins v. Collins*, 100 Ind. 266 ; *Wagoner v. Wilson*, 108 Ind. 210 ; *Butler v. Roberts*, 118 Ind. 481 ; *Doyal v. Landes*, 119 Ind. 479 ; *Fiscus v. Turner*, 125 Ind. 46 ; *Stevens v. Stevens*, 127 Ind. 560.

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We infer that the clerk of the circuit court went to the auditor's office and copied a portion of the records of his office to supply the evidence called for by the words "here insert" in the bill of exceptions. If such was the case, this portion of the evidence comes to us not only not authenticated by the signature of the judge who tried the case, but wanting the authentication of the officer who was the legal custodian of the record, a portion of which was copied into the transcript.

The appellant insists that the motion to strike out the entire bill should be overruled, but admits that if the motion only went to that portion copied from the record of the board of commissioners, it should be sustained.

The answer to this is that it appears that a portion of the evidence given in the trial is not properly in the bill, and therefore the integrity of the bill is destroyed. It is not necessary to pass upon the motion to strike out, for we can not examine the evidence in a bill of exceptions unless it contains all the evidence, which this does not do. We regret our inability to pass upon the questions of law involved in this appeal, which have been argued with signal ability; but, the question of the sufficiency of the record having been brought before us, we are compelled to examine and pass upon it.

In the absence of the evidence, there being no question presented by the record, the judgment is affirmed.

Filed June 16, 1891.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—It has long been the practice of this court, upon objections made in the brief of counsel, to refuse to consider a bill of exceptions, or parts of a bill, not properly in the record or properly framed. No motion to strike out the bill is necessary. The court, upon its attention being properly directed to the question in the brief, will decide whether the bill is in the record, and whether it is sufficient.

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The settlement of a bill of exceptions is a judicial duty, and hence can not be delegated. *England v. Clark*, 4 Scam. 486; *Toledo, etc., Co. v. Rogers*, 48 Ind. 427; *Poteet v. County Commissioners*, 30 W.Va. 58. When it appears that the bill is duly settled and authenticated it imports absolute verity. *Walls v. Anderson, etc.*, 60 Ind. 56; *Beavers v. State*, 58 Ind. 530; *Thames, etc., Co. v. Beville*, 100 Ind. 309. As the settlement of the bill is a judicial duty that can not be delegated, it results that it must be completed as the law requires before it is signed by the judge. Prior to the enactment of the statute which provides that written instruments may be brought into the bill by reference, the law required that written instruments should be copied into the bill before signing. *Board, etc., v. Embree*, 7 Blackf. 461; *Spears v. Clark*, 6 Blackf. 167; *Doe v. Makepeace*, 8 Blackf. 575; *Mills v. Simmonds*, 10 Ind. 464; *Irwin v. Smith*, 72 Ind. 482 (489). Under the present statute such instruments may be brought in by reference, but in order to bring them into the bill in that mode the instruments must appear to have been offered in evidence, they must be clearly identified by the judge, and the place for their insertion must be clearly indicated by the words "here insert." The judge can not delegate to the clerk, to the stenographer, or to any one else the authority to put a written instrument into a bill of exceptions. He may, however, where the instrument has been given in evidence, and is clearly identified, cause its introduction into the bill by a strict compliance with the statute. Where this is done no judicial duty is delegated to the clerk, for all that is required of him is to register the decision of the judge as to what shall go into the bill of exceptions. In this instance the recitals of the bill of exceptions indicate that the judge delegated to the clerk the authority to take from a record in the auditor's office an order and insert it in the bill. This was an improper delegation of duty, inasmuch as it devolved upon the clerk the duty of determining what part of the record should

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go into the bill, as well as the duty of determining what was actually in evidence. If the order had been entered of record in another State, or in another county, we think no one would doubt that the judge could not assign to the clerk the duty of bringing it into the record, and the principle must be the same irrespective of the question of the locality of the record. The only rule that can be safely followed is that which requires the instruments actually given in evidence to be identified by the judge, leaving nothing for the clerk to do but file and copy them.

Petition overruled.

Filed Feb. 26, 1892.

No. 15,365.

EUBANK ET AL. v. SMILEY ET AL.

WILL.—*Language of.—How Construed.*—In the construction of wills, courts seek to ascertain and promulgate the intention of the testator. In ascertaining such intention, isolated statements and clauses of the testament will not be selected, and their meaning determined, without any relation to other clauses or parts of the will. The courts will look to the whole instrument, and construe each part with relation to the language used in other parts of the instrument, which sheds any light on the controverted portion of the will.

SAME.—*Item Relating to Real and Personal Property.—Construction of—Life-Estate.*—A will contained the following item: "I will and bequeath all my property, both real and personal, to my faithful and beloved wife, to do with and dispose of after my decease as she may think best, and I hereby enjoin it upon her to pay all debts which may be due at my decease. And I further declare it to be my will that, at the decease of my wife, my real estate be equally divided among my heirs, and the personal property which she may leave to be disposed of as she may desire." This was the only item in the will relating to the real estate. It was not necessary to sell the real estate to pay debts.

Held, that the item of the will referred to, gave to the widow a life-estate only in the land, and the remainder to the heirs, and that the absolute

130	393
130	281
130	393
137	651
139	72
130	303
159	110

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title to the personal property was in the widow with full power of disposition.

From the Decatur Circuit Court.

J. D. Miller and *F. E. Gavin*, for appellants.

J. K. Ewing and *C. Ewing*, for appellees.

OLDS, J.—In the year 1874, William Eubank died testate, the owner of certain real estate described in the complaint in this action. By his will he disposed of his estate, and the only provision in said will relating to said real estate reads as follows :

“ I will and bequeath all my property, both real and personal, to my faithful and beloved wife, Mary Eubank, to do with and dispose of after my decease as she may think best, and I hereby enjoin it upon her to pay all debts which may be due at my decease. And I further declare it to be my will that, at the decease of my wife, Mary Eubank, my real estate be equally divided among my heirs, and the personal property which she may leave to be disposed of as she may desire.”

The complaint avers that the widow, Mary Eubank, sold and conveyed the real estate during her life, and conveyed the same to her daughter for the nominal sum of one dollar; that the appellees hold title to the same by mesne conveyances from the daughter; that no part of the proceeds of said land was needed or used for the payment of the debts of the testator.

The appellants, the plaintiffs below, claim title to the real estate as the heirs of said testator, William Eubank.

A demurrer was sustained to the complaint, exceptions reserved, and the ruling assigned as error, and this court is called upon to construe the clause of the will above set out.

It is contended on behalf of the appellants that by the will the widow only took a life-estate in the real estate, and that the fee vested in the heirs at the death of the testator, and that the right of disposition only applied to the per-

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sonal property; that, the latter clause in the devise being clear and explicit, it has the effect to limit the former words of disposition to the wife, and that the latter words, being the latest expression of the testator, control and limit the estate given to the wife to a life-estate; while upon the part of the appellees it is contended that the widow took a fee in the real estate, or at least that she was given the right of disposition, and, having disposed of it during life, the title vested in her grantee; counsel for appellee contending, further, that the words of disposition to the wife clearly give to her a fee in the real estate, and that the subsequent words of limitation, being in contravention of and repugnant to the grant to the wife, are void and of no effect.

In the construction of wills courts seek to ascertain and promulgate the intention of the testator. In ascertaining such intention isolated statements and clauses of the testament will not be selected, and their meaning determined, without any relation to other clauses or parts of the will; on the contrary, it is a well-settled rule of interpretation that courts will look to the whole instrument, and construe each part with relation to the language used in other parts of the instrument, which shed any light on the controverted portion of the will.

In the case of *Lutz v. Lutz*, 2 Blackf. 72, the court said: "This is not an instrument in which the intention of the maker must yield to any rigid principle of law. The intention of the testator, in such cases as the present, must prevail."

In *Baker v. Riley*, 16 Ind. 479, it is said: "The construction of a will depends not so much upon any rigid principle of law, as upon what appears, by the will, to have been the testator's intention. *Lutz v. Lutz*, 2 Blackf. 72. This intention is not to be collected from any particular clause, but from the whole will, taken together."

The same rule is stated in *Kilgore v. Kilgore*, 127 Ind. 276.

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In Schouler on Wills, section 559, it is said: "As a rule, an absolute devise in terms must be construed in connection with other clauses of the will which serve to modify its effect. And a fee which is given in the first part of a will may prove to be so restrained by subsequent words as to reduce it to a life-estate."

In the case of *Patty v. Goolsby*, 51 Ark. 61, it was held that, a will giving to the testator's wife his property during her natural life, or until she might marry, with full power to sell and dispose of the same as she might think proper, and providing at her death the whole estate should be divided among his children, or, in case of her marriage, the same to be equally divided between the wife and children, the wife took the personal property absolutely and a life-estate in all the real estate, and that a sale by her of the land only conveyed her life-estate.

In the case of *Giles v. Little*, 104 U. S. 291, in construing a will which gave to the wife all of the real and personal estate of the testator, with full power, right and authority to dispose of the same as to her should seem meet and proper, so long as she remained his widow, upon the condition that, if she should marry again, then all of the estate bequeathed, or whatever should remain, should go to his surviving children, the court said: "If the purpose of the testator in the disposition of his property is what the other parts of his will clearly indicate, then these words can not be construed to change that purpose. They can have operation without giving them that effect. He was seized of real estate and possessed of personal property. Both were included in the devise to the wife, and she was to have the enjoyment of both during her widowhood. The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personalty, and the entire clause to give to his children a remainder in the real estate, and whatever

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of the personalty was not consumed by the widow during her widowhood." *Baxter v. Bowyer*, 19 Ohio St. 490.

It is averred in the complaint that no part of the proceeds of the sale of the real estate was required or used in the payment of the debts of the testator, and we need not inquire as to the effect of the clause in the will which enjoins upon the widow the duty of paying debts, or as to whether or not the will gave to her any right of sale of the real estate for the payment of debts, nor are we required to consider the language used in a separate clause or remote part of the will, for all that relates to the disposition of the real estate in controversy is contained in one clause, and what is said in relation to the disposition of the real estate to the heirs of the testator must be read and considered in connection with that part making a devise of the same to the wife. By the application of the well-settled rule for the construction of wills, there certainly can be but little doubt as to the intention of the testator.

The language used in making the devise to the wife is not such as is ordinarily used in disposing of a fee simple title. In the same clause of the will we find language used in disposing of both real estate and personal property to the wife which, if it stood alone, might be sufficient to give to her a fee; and as a part of the same item, immediately following such devise and bequest, the fee in the real estate is given to the heirs of the testator, and the widow is given express authority to dispose of the personal property remaining at her death as she may desire. The item of the will, when read as a whole, as it must be, scarcely requires any construction, as it seems to us that it clearly expresses an intention to give to the widow a life-estate in the land, and the remainder to his heirs, and to give to the widow the absolute title to the personal property, with full power of disposition. The rule laid down by the Supreme Court of the United States in *Giles v. Little*, *supra*, would vest only a life-estate, as the words of disposition under that rule would

only apply to the personal property, but the latter words in the clause, we think, of themselves, limit the power of disposition to the personal property; that is to say, the words "and the personal property which she may leave to be disposed of as she may desire," in view of the disposition of the real estate to the heirs, limit the words "to do with and dispose of after my decease as she may think best," to the personal property, and gave to the widow power and authority to dispose of the personal property, and not the real estate.

We have examined the authorities cited by counsel for appellee, and do not think them inconsistent with the conclusion we have reached.

This is not a case where a fee simple has been disposed of to one person in one item of a will in clear and concise language, and afterwards taken away or modified by a subsequent clause in the will which is repugnant to such devise in fee. The disposition of the property by this will was accomplished by one item of the will. The fee was not given in the first instance in clear and concise language. We have given force to all of the language used in the disposition of the property, and we do not think that there is any inconsistent or repugnant language used. When the item is read and construed as a whole, it clearly expresses an intention to give to the widow a life-estate in the real estate, and an absolute title to the personal property, with remainder over in the real estate to the heirs of the testator.

The conclusion we have reached leads to a reversal of the judgment.

Judgment reversed at costs of appellees, with instruction to the circuit court to overrule the demurrer to the complaint.

MILLER, J., took no part in the decision of this case.

Filed Jan. 29, 1892; petition for a rehearing overruled May 10, 1892.

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No. 15,310.

DAVIS ET AL. v. BARTON ET AL.

130	399
132	64
132	506
130	399
156	671

JUDGMENT.—*Default.*—*Foreclosure of Mortgage.*—*Purchaser of Tax Title.*—*Beneficiaries of Purchaser.*—*How Affected by.*—*Decree of Foreclosure.*—*Quieting Title.*—A suit was instituted to foreclose a mortgage, and a party was made defendant to the suit who held a lien against the mortgaged premises which was junior and subject to the mortgage. After he was served with process, and during the pendency of the foreclosure proceeding, he purchased the mortgaged property at a tax sale, taking the certificate of purchase in his own name. The purchase was in fact made with the money of third parties and for their use and benefit, but without any fraudulent intent between the purchaser and the beneficiaries. A judgment by default was entered against said defendant in the foreclosure proceeding.

Held, that if said defendant had purchased the tax title in his own right, the lien would have been barred by the decree of foreclosure.

Held, also, that the beneficiaries of such purchaser do not occupy any better position than the original purchaser.

Held, also, that it was not necessary that the purchaser of the tax title should have been sued as a trustee in order to bind the beneficiaries, there being nothing to indicate that such a relation existed.

Held, also, that the appellee, or the mortgagees under whom he claims title, was not required to pay or to offer to pay the taxes on the land for which it was sold, in order to have the title to the land quieted.

From the Marion Superior Court.

S. Claypool and *W. A. Ketcham*, for appellants.

J. Buchanan, for appellees.

MILLER, J.—This was an action brought by the appellee Barton to quiet his title to a tract of real estate. A judgment was rendered in his favor, holding that he was the owner of the property, but that the appellants held a lien against the same on account of a sale for taxes. The cause was appealed to this court, and the judgment in favor of the lien for taxes reversed. *Barton v. Anderson*, 104 Ind. 578.

The cause was tried a second time, and at the request of the parties a special finding of the facts, with the conclusions of law thereon, was made by the court.

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A synopsis of so much of the special finding as we think necessary to present the questions of law involved is as follows :

In 1873 this land was mortgaged by the then owners to secure a loan of money. On the 5th day of August, 1876, the mortgagees instituted proceedings to foreclose the mortgage in the circuit court of the United States for the District of Indiana, making Daniel W. Grubbs, among others, a defendant. The charge against Grubbs, in the bill of foreclosure, was that he claimed to have some liens upon or interest in the premises, but that such interest or liens, if any, were junior and subject to the lien of the mortgage. On the 11th day of August, 1876, Grubbs was duly served with process to appear in said court on the first Monday of the following September. At the time of the filing of the bill the only interest Grubbs had in the premises was a lien against the same, which was junior and subject to the mortgage; but after he was served with process, and during the pendency of the suit in foreclosure, he purchased the property at a tax sale, taking the certificate of purchase in his own name; that in fact this purchase was made with the money of the appellants, who were partners under the name of "The Indiana Banking Company," and for their use and benefit, in virtue of an oral agreement made, without any fraudulent intent, between him and the appellants. Shortly after this purchase a judgment by default was entered against Grubbs in the suit for foreclosure, and a decree rendered, by which his equity of redemption in or to the mortgaged premises was barred and foreclosed. In pursuance of the decree of foreclosure, the property was sold to one of the mortgagees, and afterwards the certificate of purchase issued to him was sold and assigned to the appellee Barton, and on the 10th day of July, 1879, a deed for the premises was made to him. In February, 1879, a tax deed was made to Grubbs, in his own name, and in April, 1879, he conveyed the premises to the appellants, and they caused the deed to be recorded on April 23d, 1879. No

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portion of the amount paid for the purchase of the property at tax sale has been paid to Grubbs, or to the appellants, nor has any demand been made of the appellee, or those under whom he claims, for such payment; that the appellee had no knowledge or information of the fact that Grubbs was acting for the appellants in the purchase of the property at tax sale until that fact was disclosed in their cross-complaint in this action.

The court found as a conclusion of law that the decree in the foreclosure suit did not bar the rights of the appellants as beneficiaries to enforce their tax lien acquired by said Grubbs subsequent to the commencement of that suit, and prior to the rendition of the decree.

On appeal to the general term of the superior court the judgment was reversed, and the court in special term was directed to restate its conclusions of law, and to find for the plaintiff Barton, quieting his title.

From this judgment this appeal is taken.

Inasmuch as all defences may be given in evidence in actions to quiet title, under the general denial to the complaint and the cross-complaint, the questions presented by the ruling of the court, upon its conclusions of law, are not complicated by the forms of the pleadings. *Graham v. Graham*, 55 Ind. 23; *Sharpe v. Dillman*, 77 Ind. 280; *O'Donahue v. Creager*, 117 Ind. 372.

The questions involved may conveniently be discussed under two heads:

1st. Treating Grubbs as a purchaser at the tax sale in his own right, was the interest in the land acquired by that purchase, after he was served with process, but prior to the rendition of the decree of foreclosure, barred by that decree?

2d. Do the appellants, as the beneficiaries of such purchase, occupy any better position than Grubbs would have done if he had made the purchase in his own right?

When Grubbs was made a party to the action of fore-

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closure, to answer to his interest in the premises, he was called upon to assert his claims, if any, to the property, and if he failed to assert all his claims, he was, nevertheless, barred by the decree.

The purpose of making all persons having, or claiming, an interest in mortgaged property parties to the action is to settle, in one comprehensive action, all conflicting claims. *De Haven v. Musselman*, 123 Ind. 62; *Gaylord v. City of Lafayette*, 115 Ind. 423; *Craighead v. Dalton*, 105 Ind. 72; *Woodworth v. Zimmerman*, 92 Ind. 349; *Masters v. Templeton*, 92 Ind. 447; *Bundy v. Cunningham*, 107 Ind. 360; *Adair v. Mergentheim*, 114 Ind. 303; *Green v. Glynn*, 71 Ind. 336.

The purchase of property, pending a suit to foreclose a mortgage on the same, is bound by the decree subsequently rendered. *Randall v. Lower*, 98 Ind. 255; *Boice v. Michigan Mutual Life Ins. Co.*, 114 Ind. 480; *Stout v. Lye*, 103 U. S. 66; *Eyster v. Gaff*, 91 U. S. 521.

A case very much in point is *Christy v. Spring Valley Water-Works*, 68 Cal. 73, where, pending a suit in partition, the defendant acquired, after answering, but before decree, an independent title by deed. It was held that it was the duty of the defendant to disclose such adverse after-acquired title, and that, failing to do so, the judgment of the court establishing the title was conclusive on all the parties as to title or claim held by them at the time the interlocutory decree was entered.

We are, therefore, of the opinion that, treating Grubbs as a purchaser of the tax title in his own right, such lien would have been barred by the decree of foreclosure.

The question then is, do the appellants occupy any better position?

On the former appeal of this case, after holding that there was no evidence that Grubbs purchased the land for the use and benefit of the present appellants, the court says:

"Whether, conceding the fact that Grubbs did so purchase

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the land for the banking company, the latter is nevertheless bound by the default of the former in the foreclosure suit, is a question we have not considered, but as having some possible bearing on that question reference is made to section 252, R.S. 1881."

So much of the section referred to as bears upon this case, is as follows :

"An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

It can hardly be controverted but that Mr. Grubbs could have instituted an action to foreclose his tax lien in his own name, or have set up his claim in the foreclosure proceedings then pending, and that, in either event, the beneficiaries would have been concluded by the adjudication resulting. We can see no practical distinction between this and holding that they are concluded by an adjudication, where he is brought into court as a necessary party defendant. In either event he stands for his beneficiaries. It may be inferred from the finding that the agreement between Mr. Grubbs and the appellants was a secret one, at least there was no record of it, and it was unknown to the appellee. Such being the case, Grubbs was, as to all the world except the appellants, the owner of the tax claim, and in his hands it was subject to all incidents and liability that resulted from such ownership.

If the complainants in the proceedings for the foreclosure of the mortgage had desired to make the owner of the tax lien a party to such action, there was nothing of record to disclose the fact that the appellants had any interest in the claim ; nothing to suggest or put the complainants upon inquiry as to the ownership of this claim by any person other than Mr. Grubbs. If, after the decree of foreclosure, it can

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be shown, against a title acquired under that proceeding, that the claim for taxes held in the name of Mr. Grubbs was the property of the appellants, and not bound by the decree, why may it not also be shown that the judgment against one of the mortgagors, held by him, and on account of which he was made a party, was also the property of the appellants, and that they were not concluded by the decree?

The law does not favor such a mode of dealing as will permit parties, by secret means, to render foreclosures difficult and titles insecure. If what is sought in this case may be done, then no faith can be given to judgments, no certainty to any foreclosure, or security felt in any title that comes through a sale on judicial process.

It is contended that Grubbs not being made a party in his capacity as trustee, but only in his individual right, the decree is only binding upon him in the capacity in which he was sued. The general rule of law is, as claimed, that a party to a suit is only concluded by the adjudication in the capacity in which he stands in court. The question is as to the application of the rule to this case.

This is not a case similar to those in which it is held that an adjudication against a party who is sued individually is not binding upon him as an administrator, guardian or the like, where he occupies a known position, or represents known interests, separate and distinct from his individual capacity.

We can not concur in the position assumed by counsel, that it was the duty of the appellee, or the mortgagees under whom he claims title, to pay the taxes on the land for which it was sold, and that, consequently, they must, in order to have their title to the land quieted, pay, or offer to pay, such taxes.

The taxes were the taxes of the mortgagors, whose duty it was to pay the same, and the mortgagees were under no moral or legal obligation to pay them. It is often the case that a mortgagee is compelled of necessity to pay taxes to protect his mortgage, but he is not in duty bound to do so.

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A question of the amount of penalty to be recovered by the holder of the tax claim has been somewhat discussed, but, inasmuch as the conclusion we have arrived at requires us to affirm the judgment of the general term, that question need not be discussed or decided.

Judgment affirmed.

Filed Feb. 26, 1892.

No. 15,481.

THE CHICAGO AND ATLANTIC RAILWAY COMPANY v.
SUTTON ET AL.

HIGHWAY.—Order Establishing.—How Road Supervisor May Justify Under.

—Jurisdiction.—A road supervisor may justify under an order of the commissioners' court establishing a highway by showing that the board had jurisdiction of the subject-matter and of the parties, and that the order was such as might lawfully be made by it in a case of that character, and it is not necessary to set out all the facts connected with the making of the order.

SAME.—County Commissioners.—Jurisdiction.—Boards of county commissioners have original and exclusive jurisdiction of the location and establishment of all highways not within the limits of municipal corporations.

SAME.—Jurisdiction of Parties.—Notice.—Jurisdiction of the parties in the matter of establishing a highway outside the limits of a municipal corporation is obtained by posting notices as prescribed by section 5015, R. S. 1881.

SAME.—Where the jurisdiction of the commissioners' court is shown, the same presumption of regularity attends all its proceedings that attaches to the proceedings of a court of general jurisdiction.

SAME.—Petition and Notice.—Sufficiency of Collateral Attack.—Where a board of county commissioners assumes jurisdiction of the establishment of a public highway, it impliedly affirms the sufficiency of the petition and notice, and its decision can not be collaterally attacked.

SAME.—Highway of Lawful Width.—Presumption.—Section 5028, R. S. 1881, provides that "No county road shall be less than thirty feet wide, and no township road shall be less than twenty-five feet wide, and the order for laying out any highway shall specify the width thereof." An order

130	406
130	490
130	517
130	406
131	420
132	104
132	260
130	406
134	643
135	213
130	406
142	343
143	522
130	406
147	503
130	406
152	578
130	406
153	240
130	406
4155	421
130	406
167	53
1167	56

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of a commissioners' court established a highway forty feet wide up to the corporation line—twenty feet on each side of the section line being appropriated. From that point only twenty feet was appropriated for the highway by the board's order.

Held, in the absence of any averment to the contrary, that it will be presumed that the twenty feet so appropriated was to be in some manner supplemented by the appropriation of additional land within the corporation line, making a highway of lawful width.

JURISDICTION.—*Of Subject-Matter.*—A court has jurisdiction of the subject-matter when it has jurisdiction of the class of cases to which the particular case belongs.

From the Huntington Circuit Court.

B. F. Ibach, for appellant.

O. W. Whitelock and *S. E. Cook*, for appellees.

MCBRIDE, J.—This appeal involves the validity of an order of the board of county commissioners of Huntington county, purporting to establish a highway.

The appellant was the plaintiff below, and by its complaint alleged, in substance, that it was the owner of a strip of land one hundred feet wide in said county, comprising its right of way, over which it was operating a line of railroad; that at a certain point thereon the appellees had, wrongfully and without license, entered upon said right of way, torn down the fence enclosing it for a distance of forty feet on each side, and were threatening to and, unless restrained, would cut down the grade of their track, raise and construct embankments, and establish a highway across the line of their road for the use of the public; and that such threatened acts were not only without license or consent from them, but were wrongful, and without authority of law, and, if permitted, would work them irreparable injury. Prayer for injunction.

The appellees answered jointly by general denial, and also each filed a special plea.

That filed by Sutton admits the acts charged, but seeks to justify on the ground that he was acting under and in obedience to the command of his co-defendant Emley, who was

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road supervisor of the road district in which the acts complained of were done; that previously a highway had been lawfully established by the board of county commissioners of Huntington county across the appellant's right of way, and that said supervisor had given the notice prescribed by law requiring the removal of their fence within sixty days; that said fence not being removed at the end of that time, he, with others, was, by the supervisor, required to assist in its removal, and in the construction across said right of way of approaches for said highway.

Emley's separate answer also admits the doing of the acts charged, but seeks to justify on the ground that what he did was done in the legitimate exercise of his authority as road supervisor of the road district in which the acts were done, and not otherwise. The answer alleges, in substance, that he was duly elected and qualified as such supervisor, and was, when said acts were done, acting in that capacity; that on the 24th day of August, 1888, a petition for a public highway was filed with the board of county commissioners of said county by twelve freeholders of the county, six of whom were residents of the immediate vicinity of the proposed highway; that the route of the proposed highway (which is described in the answer) crossed the appellant's right of way at the point where the acts complained of were done; that there was "no other good way to locate said highway, * * * except by crossing plaintiff's right of way at that point; that notices of the hearing of said petition were posted in three public places in the neighborhood of such proposed highway on the 9th day of August, 1888; that the lands included in plaintiff's right of way were described in said petition and notices, and that the petition and notices described the line of the highway petitioned for to pass over and across plaintiff's right of way at the place described in plaintiff's complaint."

It is further averred that at the September term of the commissioners' court the board of commissioners, "after

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hearing and examining said petition, notices and proofs," appointed viewers, who, after qualifying, viewed, marked out, and located said proposed highway, forty feet wide as prayed for in the petition, and made their report of the same to the board of commissioners, reporting at the same time that said proposed highway would be of public utility; that at the December term, 1888, their report was approved by the board, an order was made establishing the highway as petitioned for, and the county auditor was directed to transmit a certified copy of the proceedings to the township trustee of said township, which it is alleged was done. The final order made by the board was as follows:

"The board, after carefully examining, and being fully advised in the premises, does approve of said viewers' report, and ordered said work opened as petitioned for. And it is further ordered by the board that the auditor transmit a certified copy of said viewers' proceedings to the trustee of Huntington township."

It is further alleged that the certified copy of the order and report was delivered to the township trustee, who made a "proper record" of the highway, and ordered the appellee, as supervisor of road district No. 4, to open and improve it; that on the 23d day of January, 1889, he gave to appellant notice to remove its fences from across the line of the highway thus established within sixty days, but that at the expiration of the sixty days the fence had not been removed, whereupon, as such supervisor, he, with his co-defendant and other laborers, proceeded to "tear down the fence" of the appellant, as alleged in the complaint.

The appellant demurred to both answers, on the ground that they did not state facts sufficient to constitute a defence. The demurrers were overruled, and these rulings are assigned as error.

The appellant then, by leave of court, filed a second paragraph of complaint, setting out a full and complete transcript of the files and order-book entries in the proceeding

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to establish the highway, beginning with the petition and ending with the notice by the supervisor to remove the fence referred to in the answer of Emley. This discloses the following facts in addition to those shown by the answer:

The petition asked for the location of a highway beginning at a section corner some distance due east of the southeast corner of the corporation boundary of the city of Huntington, and running thence west to the city limits, and thence continuing for some distance along the south line of the corporation. East of the city limits it was to be forty feet wide, twenty feet to be taken from each side of the section line. Appellant's right of way is on this part of the route. That portion along the south line of the city was to be but twenty feet wide, all to be taken from the land lying outside of the city limits. The notice which was posted was full, and the proof of its posting is also in proper form, and shows that it was properly posted and in due time. It is averred, however, that the appellants had no actual notice. The following is the order-book entry relating to notice: "And the board, after carefully examining and fully considering said petition, copy of notice, proof of posting, and all other papers filed herein, finds that said petition is signed by the requisite number of freeholders as required by law, and that said petition is good, and does order," etc.

The report of the viewers shows that they viewed and marked out the highway over the route, and of the width asked in the petition, and that they considered the proposed road of public utility.

The order approving the report and establishing the highway fixes its width, as indicated in the petition and viewers' report, at forty feet for a portion of the distance, and twenty feet for the remainder. It is averred in the complaint that at the point where the width of forty feet ends there is "no egress except to return as one comes in, and gives no outlet to any one, and is of no public utility whatever."

The court sustained a demurrer to this paragraph of com-

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plaint, on the ground that it did not state facts sufficient to constitute a good cause of action. This ruling is also assigned as error.

The principal controversy is over the answer of Emley, and the second paragraph of complaint. It is insisted that to make the answer good a transcript of the proceeding before the commissioners should have accompanied it; that, the commissioners' court being a court of limited and special jurisdiction, action under an order made by it can only be justified by setting out all the facts connected with the making of the order, thereby showing affirmatively that the board had jurisdiction in the given case.

In this the appellant errs. The error lies in its misconception of the jurisdictional facts which are sufficient to render an order of the board of commissioners invulnerable to collateral attack.

That the officer might justify under the order, it was only necessary for him to show that the board had jurisdiction of the subject-matter and of the parties, and that the order was such an order as might lawfully be made by it in a case of that character. By jurisdiction of the subject-matter is meant jurisdiction of the class of cases to which the particular case belongs. *Yates v. Lansing*, 5 Johns. 282; *Jackson v. Smith*, 120 Ind. 520 (522); *State, ex rel., v. Wolever*, 127 Ind. 306 (315).

In this case the subject-matter was the establishment of a highway outside the limits of a municipal corporation. Boards of county commissioners have original and exclusive jurisdiction of the location and establishment of all highways not within the limits of municipal corporations. The board, therefore, had jurisdiction of the subject-matter. Jurisdiction of the parties in such cases is obtained by posting notices as prescribed by section 5015, R. S. 1881.

The answer alleges the posting of the notices as required by this section. This is sufficient to show jurisdiction of the parties. The answer shows that the viewers marked out

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and located the proposed highway forty feet wide, and that the board approved the report and established the highway as petitioned for. This was such an order as the board might lawfully make in a case of that character upon proper showing and proofs.

The jurisdiction of the court being shown, the same presumption of regularity attends all its proceedings that attaches to the proceedings of a court of general jurisdiction. *Board, etc., v. Markle*, 46 Ind. 96 (112); *Jackson v. Smith*, *supra*, and cases there cited.

It will, therefore, be presumed in aid of the order made, that every fact necessary to its validity existed. In our opinion the answer was sufficient, and the court did not err in overruling the demurrer to it.

This brings us to the consideration of the second paragraph of complaint. Here the controversy hinges on one fact. The petition asks for the location of a highway forty feet wide for a certain distance and only twenty feet wide the remainder of the way.

The report of the viewers and the order of the board both follow and conform to this.

Section 5028, R. S. 1881, is as follows: "No county road shall be less than thirty feet wide, and no township road shall be less than twenty-five feet wide, and the order for laying out any highway shall specify the width thereof."

It is insisted that the board of county commissioners had no power to establish a highway under any circumstances which was only twenty feet in width; that for this reason it had no jurisdiction to entertain a petition asking the establishment of a highway which, for any part of its length, was to be only twenty feet wide; and that the proceedings were therefore void *ab initio*.

It is also insisted that the record does not show notice. So far as the question of notice is concerned, we think, aside from any finding or order by the board, the record sufficiently shows the posting of notices as required, to give the

board jurisdiction. But, even if this were not true, it has been several times decided by this court, that in such cases the board of commissioners having the power to decide, and being charged with the duty of deciding whether the petition and notice are sufficient to authorize further proceedings upon them, the assumption of jurisdiction over the subject-matter, and the taking of further action, impliedly affirms the sufficiency of both, and that the decision thus made can not be attacked collaterally. *Adams v. Harrington*, 114 Ind. 66; *Muncey v. Joest*, 74 Ind. 409; *Town of Cicero v. Williamson*, 91 Ind. 541; *Stoddard v. Johnson*, 75 Ind. 20; *Ricketts v. Spraker*, 77 Ind. 371.

We think the rule thus asserted, and which we fully approve, furnishes the key for the determination of the other question.

Jurisdiction does not depend upon the sufficiency or the correctness of the averments of the petition, but upon the subject-matter to which it relates. As we have already seen, the subject-matter was within the jurisdiction of the board. A defective petition for a highway, or a petition for a highway which also contains a prayer for relief partially beyond the power of the board to grant, will nevertheless as effectually invoke its jurisdiction, and clothe it with power to adjudicate upon the matter presented, as a defective complaint in the circuit court to foreclose a mortgage, or a complaint of that character, which, as a part of the relief demanded, asks an order for the imprisonment of the delinquent debtor, will invoke the jurisdiction of that court, and invest it with power to adjudicate upon the sufficiency of the complaint. The jurisdiction of the circuit court in the matter of the foreclosure of mortgages is no more complete than is the jurisdiction of the board of county commissioners in the matter of establishing highways. The board had the power to hear and pass upon the sufficiency of the petition, and its decision, whether right or wrong, can not be attacked collaterally. The power to decide implies the power to decide

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wrong as well as right. *Snelson v. State, ex rel.*, 16 Ind. 29; *Board, etc., v. Markle, supra*; *Jackson v. Smith, supra*; *State, ex rel., v. Wolever, supra*.

Having the power to decide, it would be illogical to say that an erroneous decision ousted its jurisdiction. The right by which it may decide at all must protect against collateral attack the subsequent steps, necessarily following, or which might legitimately follow if the decision was correct. *State, ex rel., v. Wolever, supra*.

By this we do not mean to affirm that every order or judgment of a court having jurisdiction of both subject-matter and parties is safe from collateral attack. On the contrary, an order or judgment, even of a court of general jurisdiction, may be void, and may be thus attacked. For instance, in the case put above, suppose the circuit court, in foreclosing the mortgage, added to its decree a judgment sentencing the debtor to the State prison for a term of years, the judgment of imprisonment would be void. It might safely be ignored, and could be attacked collaterally. The reason for this, however, would be that such a judgment would not be a mere excess of jurisdiction, but would be a usurpation of jurisdiction—an act wholly extra-judicial, and outside the law. In like manner, if the board of county commissioners should make an order establishing a highway, and should couple with it a decree assuming to vest in the public a fee in the land, instead of a mere easement, such decree would be void. We are also of the opinion that an order of a board of county commissioners assuming to establish a highway twenty feet wide and no more, if that fact is shown by the record, would be void, as it would be not only without authority, but in plain violation of the statute. Therefore, in the case at bar, notwithstanding the averments of the second paragraph of complaint show that the board had jurisdiction both of subject-matter and of parties, if it shows the making of an order in violation of the statute it is, in so far as it thus transcends the power of the board.

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void, and may be collaterally attacked. How does this affect the case? Every presumption favors the validity of the action of the board. If, by any reasonable construction of the facts averred, with any reasonable presumption arising therefrom, its action can be sustained, we are bound to adopt such construction, and indulge in such presumption.

The facts pleaded show that the portion of the so-called highway in question, which is only twenty feet wide, is that part adjoining the city boundary, and on the section line. Before reaching the corporation line a strip twenty feet wide was appropriated on each side of the section line. It was, however, not in the power of the board to establish a highway within the limits of the corporation, as the statute gives to the city authorities exclusive control, and they alone can establish streets therein. *Sparling v. Dwenger*, 60 Ind. 72; *Tucker v. Conrad*, 103 Ind. 349.

We can, however, see no good reason why a board of county commissioners may not act in conjunction with the city authorities in establishing a highway along the line of such municipal corporation, each appropriating as much land as may be necessary, in connection with that appropriated by the other, to make a highway of lawful width. From anything averred in the complaint, or shown by the record, we can not say that the petition in this case was not filed, and that the order of the board was not made, in pursuance of proposed concurrent action by the adjacent corporation, or proposed concurrent dedication by the owners of the adjacent lands within the city limits, which would result in the appropriation of additional land within the corporation line, corresponding to that appropriated by order of the board up to that point. The correctness and legality of the action of the board being presumed, it is incumbent on those who assail it to overcome every presumption of legality by full and unequivocal averment. As, in our opinion, such concerted action between the board and the city authorities, or between the board and the owners of the adjacent lands

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within the city limits would be a substantial compliance with the law, we will presume, in the absence of any averments to the contrary, that the twenty feet appropriated by the order of the board was to be in some legal manner supplemented, making a highway of lawful width.

The foregoing is upon the theory assumed by the appellant, that if the order is void as to any portion of the highway attempted to be established, it is necessarily void throughout its entire length. This, however, we wish it clearly understood we do not affirm. Indeed, while we do not feel compelled to decide the question in this case, we question the right of the appellant to in this manner attack the order made, even if it was void as to that portion of the road bordering on the city. The order establishes a highway of lawful width, from the place of beginning, up to and over that part of the route which directly affects the appellant. Appellant made no resistance, did not appeal and charges no fraud. We doubt its right to maintain a collateral assault on the order because as to some other part of the route the board failed to make a valid order.

Judgment affirmed, with costs.

Filed Feb. 23, 1892.

No. 15,265.

130	415
135	392

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ACTION.—Splitting.—An entire cause of action can not be split up so as to enable a party to maintain more than one action upon it.

SAME.—Parties Dividing Cause of Action.—Parties having a common cause of action can not divide it up so as to enable each to bring a separate action upon it.

JUDGMENT.—Tort.—Splitting up Action.—Res Judicata.—An entire claim arising from a single tort can not be divided and made the subject of several suits, however numerous the items of damages may be; and a judgment upon any part of such a cause of action is a bar in other actions arising out of the same tort.

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SAME.—*Prosecuting Suit in Another's Name.*—*Effect.*—One who prosecutes a suit in the name of another to establish a right of his own is as much bound by the result of such suit as he would be if he were a party to the record.

REAL ESTATE.—*Res Judicata.*—*Judgment for Recovery of Part of Tract.*—If the owner bring an action to recover possession of a single and undivided tract of land and succeed, he can not afterwards bring an action, upon the same grounds he brought the first action, to recover the remaining part.

From the Porter Circuit Court.

H. A. Gillett and A. L. Jones, for appellant.

A. C. Harris, E. D. Grumpacker, S. C. Spencer and L. Cox, for appellee.

COFFEY, J.—This was an action in ejectment commenced in the Lake county circuit by the appellant against the appellee on the 13th day of January, 1875.

The land in dispute lies in a triangle formed by the State line and Lake Michigan, at the extreme northwest corner of the State.

The triangular tract was cut into lots by the United States survey.

The north lot is numbered one and the lot immediately south and adjoining number one is numbered two. It was swamp land, and was formally conveyed by the United States to the State of Indiana by Swamp Land Patent No. 4, on the 24th day of March, 1853. It is situated in section 36, township 38 north, of range ten (10) west, in Lake county.

Eggers, the appellee, purchased and paid for lot numbered one on the 19th day of July, 1853, and the State executed to him a patent therefor on the 17th day of January, 1854. The State executed a patent to George W. Clark for lot numbered two on the 3d day of July 1854.

The cause was tried in the Lake Circuit Court at the February term, 1877, resulting in a judgment for the defendant. The plaintiff was granted a new trial under the statute, as of right, and at the April term of the court, in the year

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1880, the cause was dropped from the docket, with an agreement that it might be reinstated, by either party, at any time on motion. The cause was reinstated on motion of the appellant, Roby, on the 4th day of September, 1888, and the venue was changed to the Porter Circuit Court. At the January term of that court for 1889 the cause was retried, resulting in the judgment from which this appeal is prosecuted. The jury returned a special verdict, from which, among other things, the following facts appear:

The line dividing the States of Indiana and Illinois was first run from the Wabash river to Lake Michigan about the year 1821. Under an act of Congress it was retraced about the year 1833, and the government erected a monument on the line, as retraced, 159.323 miles north of the Wabash river. The monument is about 790 feet south of the lake shore. In the year 1851, the land being vacant, the appellee, Eggers, settled upon what he believed to be lot numbered one. He found a stake driven in the earth on the State line south of the monument, at a point 1,704.06 feet south of the center of the monument. He also found a similar stake just above high-water mark on Lake Michigan, 1,538 feet distant from the stake first mentioned. The line running from the stake on the State line to the stake on the lake shore bears three degrees and twenty minutes south from a due east and west course. Eggers, believing that these stakes marked the south line of lot numbered one, in the year 1851 built a shanty on lot two north of said line, and began the erection of a fence between the stakes on the line, and also a fence from the stake on the State line north to the monument, for the purpose of enclosing the land, which fences were completed in the year 1852. In the same year he plowed and cultivated a portion of the land north of and down to the fence. In the latter part of 1852 he built a frame house, consisting of several rooms, within his enclosure, in which he resided. The house was built on lot numbered one, about 800 feet north

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of the fence. In the year 1855 he planted an orchard on the premises, and in the same year, one of his children dying, he buried it on the premises, and has ever since maintained the grave. The grave is about 350 feet south of the house, and the orchard is between the house and grave. From the time he constructed the fence until the commencement of this suit, Eggers, each year, cultivated the tillable land north of the fence, and up to the fence. The portions not tillable and growing grass were every year during that time mowed or pastured by him. During all this period he claimed to own all of the land north of the fence, except such as he sold to certain railroads for right of way.

Clark, after he became the owner of lot numbered two, was often at the house of Eggers, and knew of the occupancy and of the existence of the fence. The fence, at times, was partially destroyed by fire or other causes, but was restored within a reasonable time, from time to time, until the year 1871, when it was principally destroyed by fire, and rebuilt in the year 1873 or 1874; but from the time it was burned down until it was rebuilt there were portions of it, and many stakes and posts along the line, clearly and visibly marking the same; and during all the time from the year 1851 to the commencement of this suit Eggers was in open and exclusive possession of all of the land north of the fence running easterly from the State line to Lake Michigan, and during all that time openly and notoriously claimed the same as his own.

George W. Clark died in the year 1866, testate, appointing Jacob Forsyth and Robert Clark executors of his will. The will was probated and recorded in Lake county on the 26th day of December of that year. He devised lot numbered two to Caroline M. Forsyth, Sarah J. Clark, Robert D. Clark and Henry F. Clark. On the 1st day of December, 1868, the executors, under competent authority, conveyed lot two, with other lands, to said Caroline M. Forsyth, and on the same day Sarah J. Clark, Harriet S. Clark, Robert D.

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Clark and Henry F. Clark, conveyed the same real estate to her by quitclaim deed. On the 9th day of March, 1869, Caroline M. Forsyth conveyed by warranty deed to Daniel A. Jones, Oramel S. Hough, Charles M. Culbertson and Charles L. Raymond. On the 15th day of July of the same year Raymond conveyed to Herbert B. Reed. On the 15th day of July, 1873, Jones, Culbertson, Hough and Reed, conveyed to the appellant, Roby. On the 7th day of August, 1873, Roby conveyed to Dayton S. Morgan, and on the next day, August 8th, Morgan conveyed all of lot two, in the possession of the appellee, Eggers, to appellant, Roby, and, also, all the remainder of the north twenty acres of said lot two. At the time Roby conveyed to Morgan, both Roby and Morgan claimed that the north line of lot two ran some distance north of Eggers' south fence, and Morgan reconveyed to Roby without any consideration, and for the sole purpose of enabling Roby to negotiate and settle with Eggers for the possession and ownership of the portion of the lot in the possession of Eggers north of his south fence. On the 7th day of August, at the time Roby conveyed to Morgan, they executed a written agreement between them fixing the ownership of the lot. Pursuant to such agreement Roby brought this suit in his own name, as the trustee of Morgan, for the purpose of recovering that portion of the lot in the possession of Eggers, being the portion north of Eggers' south fence, for the use and benefit of Morgan. Morgan defrayed the expense of this suit until the 17th day of January, 1877, when he conveyed an undivided one-half interest to E. Ashley Smith, since which time they have jointly borne the expenses of this suit, and at the time of the trial it was prosecuted for their use and benefit, except as to a contingent interest in the land in favor of the appellant under the contract above referred to.

After this case was dropped from the docket of the circuit court of Lake county, the appellant, Roby, Morgan and Smith, determined to bring an action in ejectment in the Cir-

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cuit Court of the United States for the District of Indiana, and on the 15th day of July, 1882, Roby directed an attorney, U. J. Hammond, to begin an action in that court in the name of Smith and Morgan, citizens of New York, against Eggers, a citizen of Indiana, for the north part of lot numbered two. On the 26th day of July of that year the complaint was filed, alleging that Morgan and Smith were the owners in fee simple, and entitled to the possession, of the following described real estate in Lake county, to wit: "All of the north part of lot numbered two, in section 36, township 38 north, of range 10 west, of 2d principal meridian, which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot two, and 753 feet south therefrom." Roby furnished an abstract of title, which was filed in the cause, showing the same deeds introduced in evidence in this cause, except the deed from Morgan to Roby of date August 8th, 1873.

To the complaint in the cause Eggers filed a general denial.

The cause was tried on the 20th day of January, 1883. Roby was present and testified as a witness on behalf of the plaintiffs, and argued the cause as an attorney for them.

On the 26th day of January the court rendered the following judgment:

"Now come the parties by counsel, and by agreement this cause is submitted to the court for trial, and the court, having heard the evidence, and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of the defendant the possession of so much of said lot 2 as lies south of the south line of lot No. one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the State line eastward to Lake Michigan, and assesses the damages at \$1.00 and costs, taxed at \$——, which the plaintiffs recover of the defendant. All of which is finally ordered, adjudged and decreed."

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Roby filed his own affidavit in support of a motion for a new trial, which was denied.

The fence which the court adjudged to be on the south line of Eggers' land was the fence constructed by him in 1852, and since maintained by him.

This statement embraces all the material facts in the case.

As the appellant shows a perfect chain of title from the Government to himself for the whole of lot two, it follows that he was entitled to recover in the Circuit Court, unless the appellee made good some affirmative defence.

In that court the appellee relied upon four several defences, namely :

First. Former adjudication of the matters involved in this suit.

Second. The twenty years' statute of limitations.

Third. Estoppel ; and,

Fourth. Champerty.

If it is true that the matters involved in this controversy have once been litigated and settled between the parties to this suit, in a court of competent jurisdiction, then the other matters relied upon as a defence become wholly immaterial, and need not be inquired into ; hence we proceed first to an examination of the matters relied on as constituting this defence.

It is insisted by the appellee that the case in the Circuit Court of the United States between Smith and Morgan, on one side, and the appellee here, settled the right of the appellee to the ownership of the land involved in this suit, and that the appellant is bound by the result of that suit ; while, on the other hand, it is claimed by the appellant that the judgment rendered by the Circuit Court of the United States is void.

The contention of the appellant that this judgment is void is based, principally, upon the fact that it appears by the special verdict in this case that no part of the land sued for

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in the Circuit Court of the United States was south of the line fixed by the judgment rendered in that cause.

Whatever else may be said of this judgment, it is certain that it fixed the fence erected by Eggers in 1852 as the line between lots one and two, and fixed the right of the plaintiffs in that case to recover their costs as against Eggers. If it be true, as contended here, that no part of lot two for which suit was brought was south of the fence erected by the defendant, the court probably erred in rendering judgment in favor of the plaintiffs for the recovery of any land, and for the recovery of costs; but, as that was an error in favor of the plaintiffs, they should not now complain. We think the effect of that judgment was also an adjudication that the plaintiffs in that case were not entitled to recover from Eggers any portion of lot two situated north of the line which it fixed. The case was appealed to the Supreme Court of the United States, and is reported in 127 U. S. 63.

It was contended in that court that there was, in effect, a general finding for the plaintiffs as to all the land in dispute, and that judgment should have been in their favor for the whole of the premises described in the complaint. In relation to this contention, the court said: "But the record, fairly interpreted, does not show any such finding. * * * That order plainly indicates a general finding for the plaintiffs only as to a part of the land in controversy, that is, as to the part described in the order. The judgment is for the recovery only of the possession of the premises so described. Such a judgment was proper, if the plaintiffs failed to show title to the remaining part of the premises in dispute."

It is an elementary principle of law that an entire cause of action can not be split up so as to enable a party to maintain more than one action upon it. This is especially true of a cause of action sounding in tort. An entire claim arising from a single tort can not be divided and made the subject of several suits, however numerous the items of damages may be, and a judgment upon the merits of any part

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of such cause of action will be available as a bar in other actions arising out of the same tort. 2 Black Judg. 738.

Thus it has been held that for a single and complete trespass upon and injury to an entire tract of land several actions for damages can not be maintained, a recovery of damages in respect to a part of the land being a bar to any further recovery for the same trespass. Black Judg., *supra*; *Pierro v. St. Paul, etc., R. W. Co.*, 39 Minn. 451; *Cunningham v. Morris*, 19 Ga. 583. See, also, *Stewart v. Dent*, 24 Mo. 111; *Brannenburgh v. Indianapolis, etc., R. R. Co.*, 13 Ind. 103; *Board, etc., v. Applewhite*, 62 Ind. 464; *Sutherland v. Mullis*, 17 Ind. 19.

In this case Smith and Morgan brought their action for the recovery of a part of a single tract of land, alleging that Eggers unlawfully held possession of the same. The action was prosecuted to final judgment, in which they recovered judgment for so much of the land as was located south of a line designated in the judgment, damages for its detention, and for costs of the action. This action is for the recovery of the same land which they sought to recover in that action. If that judgment is inoperative so far as it directs the recovery of land, by reason of the fact that no land is located south of that line, still it is binding and operative as a judgment for damages and for costs; in other words, it is not void. So, too, it settles the right of Eggers to hold all the land north of the designated line as against Smith and Morgan, inasmuch as they can not prosecute another action for its recovery.

In our opinion the judgment rendered by the Circuit Court of the United States for the District of Indiana estops Smith and Morgan from asserting any claim to the land in controversy in this suit.

The question still remains as to whether that estoppel binds the appellant in this case. In the consideration of this question it must be kept in mind that this suit was instituted by the appellant as the trustee of Morgan and Smith; that at

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the trial it was prosecuted for their use and benefit, except as to the contingent interest of the appellant under his contract with Morgan.

Were it not for the contingent interest of the appellant, the question would be free from difficulty, as the rights of both Morgan and Smith were settled in their suit against Eggers in the Circuit Court of the United States.

What the contingent interest of the appellant in the land is does not appear in the special verdict; but the suit in the Circuit Court of the United States against Eggers was instituted after the execution of the contract between the appellant and Morgan, and was instituted in the name of Smith and Morgan, under the advice and with the consent of the appellant. An abstract of title was furnished in that case by the appellant, omitting the deed from Morgan to himself, and when the cause was tried he was present as a witness on behalf of the plaintiffs, and, also, appeared and argued the cause as their attorney.

Parties having a common cause of action can not divide it up so as to enable each to bring a separate action upon it, and thus annoy a defendant with several suits. There was but one cause of action against Eggers, and if Smith, Morgan and the appellant jointly possessed this right, or if the appellant held a contingent interest in the land, by bringing suit in the name of Smith and Morgan he must be held to have consented that they should represent his interest as well as their own. Furthermore, by furnishing an abstract showing title in Smith and Morgan, he must be held as having represented to the court, in which the cause was pending, that they were the beneficial owners of the land, and to have thus enabled them to recover in that action. One who prosecutes a suit in the name of another to establish a right of his own, is as much bound by the result of that suit as he would be if he were a party to the record. *Palmer v. Hayes*, 112 Ind. 289; *Burns v. Gavin*, 118 Ind. 320; *Freeman Judgments*, section 174; *Montgomery v. Vickery*, 110 Ind.

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211 ; *Stoddard v. Thompson*, 31 Iowa, 80 ; *Elliott v. Hayden*, 104 Mass. 180 ; *Train v. Gold*, 5 Pick. 380.

As the appellant in this cause procured the commencement of this suit in the Circuit Court of the United States in the name of Smith, and Morgan filed an abstract of title showing title in them, and prosecuted the suit for them as one of their attorneys, and thus procured a final judgment, involving the identical matters involved in this suit, we think he should not be heard to say now that he is not bound by the result of that litigation. *De Metton v. De Mello*, 12 East, 234 ; *Oromwell v. County, etc.*, 94 U. S. 351 ; *Shirley v. Fearn*, 69 Am. Dec. 375 ; *Tarleton v. Johnson*, 60 Am. Dec. 515 ; *Calhoun v. Dunning*, 4 Dallas, 120 ; *Shugart v. Miles*, 125 Ind. 445.

In speaking of the rule which prohibits the splitting of a cause of action, a learned author has said : " The principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice and not to be classed among technicalities. It was intended to suppress serious grievances. In point of fact, this rule is not even a product of modern jurisprudence, but was well known in the Roman systems." 2 Black Judg., section 734.

As we have reached the conclusion that the appellant is bound by the result of the litigation in the circuit court of the United States in the suit of Smith and Morgan against the appellee in this case, involving the identical land involved here, and is estopped thereby from prosecuting this suit, and as the judgment of the circuit court should be affirmed for this reason, it becomes unnecessary to inquire whether the facts set out in the special verdict do or do not sustain the other defences claimed by the appellee.

Judgment affirmed.

Filed Dec. 17, 1891 ; petition for a rehearing overruled Feb. 23, 1892.

Harris v. Tomlinson *et al.*

No. 14,801.

HARRIS v. TOMLINSON ET AL.

130	426
150	339

130	426
138	614

130	426
150	373

130	426
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BILL OF EXCEPTIONS.—*Use of "Testimony" for "Evidence."*—The using of the word "testimony" for "evidence," in a bill of exceptions, where the meaning is obvious, will not defeat the operation of such an instrument.

SAME.—*Use of "Offered" for "Introduced."*—The use of the word "offered" in place of "introduced," in a bill of exceptions, with reference to the introduction of evidence, is sufficient if the record affirmatively shows that all the evidence offered was introduced. The error occasioned by the inadvertent use of the word "offered" for "introduced," in such a connection, is cured by the phrase "this was all the evidence given in the cause."

SAME.—*Nunc Pro Tunc.—Appeal.—New Trial.*—A bill of exceptions may be amended by a *nunc pro tunc* entry, and the order appealed from without a motion for a new trial.

SAME.—*Who May Apply for Correction.*—The party who has prepared a bill of exceptions may apply to have it corrected; but the evidence will be more closely scrutinized than if the opposite party made the application.

SAME.—*Laches.*—A party who has been guilty of laches in securing the correction of a defective bill of exceptions will not be granted any relief.

NUNC PRO TUNC ENTRY.—*Auxiliary.—Appeal.*—A proceeding for a *nunc pro tunc* order is part of the original cause of action, and auxiliary thereto, and may be brought up on appeal of that action.

SAME.—*Appeal.—How Taken.*—*Nunc pro tunc* entries made during the progress of a case can not be appealed from as such, but may be brought up with the case when an appeal of such case is taken; but such entries made after the case has been determined may be appealed from without bringing up the entire case.

SAME.—*Motion for a New Trial.*—In order to present the sufficiency of the evidence on a motion for a *nunc pro tunc* entry, a motion for a new trial is not necessary.

SAME.—*Notice.—Summons.*—A mere notice is sufficient on a motion for a *nunc pro tunc* entry, and a summons is not required; but if a summons is issued it will be treated as a notice.

SAME.—*Pleading.—Motion.—Sufficiency.*—On such a motion no formal pleading is necessary, and no great strictness is required in the preparation of the motion.

SAME.—*Inherent Power of Court.*—A statute is not necessary to enable a court to correct mistakes and make its record speak the truth.

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SAME.—Office Not to Correct Mistakes.—Such an entry can not be used as a medium whereby a court can change its rulings actually made, however erroneous or under whatever mistakes of law or facts such ruling may have been made; nor to correct mistakes made by counsel in the introduction of evidence.

From the Marion Superior Court.

T. E. Johnson, S. M. Shepard and W. E. Niblack, for appellant.

F. Knefler and J. S. Berryhill, for appellees.

MILLER, J.—The errors assigned require an examination of the evidence introduced upon the trial of the cause; and we are met at the threshold with the claim that the evidence is not in the record in such manner as to enable us to pass upon its sufficiency to sustain the finding and judgment.

The evidence, as we find it in the record, consists entirely of certain court records, executions, and sheriff's deeds, interrogatories and answers thereto. The bill of exceptions recites in the introductory clause that the plaintiff, to maintain the issues on his part and behalf, introduced the following "testimony;" also, in every instance, the term "offered in evidence," is used where the words "introduced in evidence" should have been.

We find, however, at the close of the bill of exceptions, the statement that "this was all the evidence given in the cause."

The context makes it clear that the word "testimony" refers to the evidence immediately following it, which, as we have said, was entirely documentary. While the word "testimony" is not synonymous with the word "evidence," it was in this instance used in that sense. We can not permit the simple misuse of a word, where the meaning is obvious, to defeat the operation of an instrument of such importance as a bill of exceptions.

The case of *Kleyla v. State, ex rel.*, 112 Ind. 146, and others of similar import, where the bill of exceptions concludes with

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the statement that "this was all the testimony given in the cause," are not in conflict with this position.

The bill also shows that in connection with each instrument given in evidence the word "offered" appears where the word "introduced" is usually used; but, inasmuch as the record affirmatively shows that all the evidence offered was introduced, and constitutes a part of that which the bill says was "all the evidence given in the cause," the bill is not fatally defective on that account. This case is distinguishable in this respect from *Goodwine v. Crane*, 41 Ind. 335; *American Ins. Co. v. Gallahan*, 75 Ind. 168; *Peck v. Louisville, etc., R. W. Co.*, 101 Ind. 366; *Garrison v. State*, 110 Ind. 145.

The bill of exceptions recites the giving in evidence of an execution issued on the 7th day of October, 1876, on a judgment rendered in the common pleas court of Marion county, and the return of the sheriff endorsed thereon. This execution and return are not set out in the transcript, but are marked as "not on file."

The appellee contends that the bill of exceptions is fatally defective, because it shows on its face that there was evidence given on the trial that is omitted from the bill. The authorities fully sustain this contention. *State, ex rel., v. Marsh*, 119 Ind. 394; *Lawrenceburgh Furniture Mfg. Co. v. Hinke*, 119 Ind. 47; *Saxon v. State*, 116 Ind. 6; *Cowger v. Land*, 112 Ind. 263; *Louisville, etc., R. W. Co. v. Grantham*, 104 Ind. 353; *Stout v. Turner*, 102 Ind. 418; *Jennings v. Durham*, 101 Ind. 391; *Collins v. Collins*, 100 Ind. 266.

In order to cure this defect in the record the appellant instituted a proceeding, by notice and motion, in the superior court of Marion county, before the judge who tried the cause, to amend and correct the bill of exceptions, by expunging therefrom all that part which recites the giving of the execution and return above mentioned in evidence.

The appellee appeared to the motion, and stubbornly contested the making of the amendment. The proceedings re-

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sulted in the making of an order for the amendment of the bill as prayed for, and this action was affirmed by the court in general term.

The appellee in this case appealed from this judgment to this court, where the appeal has been docketed as a separate cause. *Tomlinson v. Harris, ante*, p. 339.

Proceedings to amend bills of exceptions, like other applications for *nunc pro tunc* orders, are not actions separate and distinct from the original action, but are merely auxiliary thereto, and should, where an appeal in the main action is pending, be brought up on appeal as a part of that action, and not as an original case. *Hamilton v. Burch*, 28 Ind. 233; *Seig v. Long*, 72 Ind. 18; *Hannah v. Dorrell*, 73 Ind. 465.

The practice in this respect not having been uniform, we will treat the record in *Tomlinson v. Harris, supra*, as a return to a *certiorari*, which has been asked for in this action, and determine the questions involved upon their merits.

We are unable to agree with counsel for the appellant that a judgment ordering the amendment of a bill of exceptions is not such as may be appealed from, either from the trial court to the general term, or from the general term to this court. The practice in this State has uniformly recognized such right of appeal. *Morgan v. Hays*, 91 Ind. 132; *Hamilton v. Burch, supra*; *Williams v. Henderson*, 90 Ind. 577; *Seig v. Long, supra*.

The same rule applies to orders made amending records other than bills of exceptions. *Uland v. Carter*, 34 Ind. 344; *Bales v. Brown*, 57 Ind. 282; *Douglass v. Keehn*, 78 Ind. 199; *Conway v. Day*, 79 Ind. 318; *Walker v. State*, 102 Ind. 502.

In *Douglass v. Keehn*, 71 Ind. 97, it was held that an amendment of the record, made by the trial court upon due notice, could only be questioned by appealing therefrom.

The rule contended for would doubtless be correct where

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the amendment was made at the term, and while the proceedings were *in fieri*.

The appellee appeared specially to the notice served upon him of the application to amend the bill, and asked the court to quash the same, but his motion was overruled.

In this the court did not err. A summons is only required at the commencement of an original action. We believe it to be a rule of universal application that when a party has once been brought into court, either by a summons or a voluntary appearance, a mere notice is sufficient to bring him back into court in the same cause, in any subsequent proceedings. Where a summons in such case has been issued and served, it will be treated as a mere notice. *Gray v. Robinson*, 90 Ind. 527; *Latta v. Griffith*, 57 Ind. 329.

After full appearance, the appellee filed a motion to dismiss the petition, or application, to the court for the correction of the bill, and makes complaint of the action of the court in overruling his motion.

This method of testing the sufficiency of a motion for a *nunc pro tunc* entry is sustained by the authorities. *Douglas v. Keehn*, *supra*, and cases cited; *Conway v. Day*, *supra*.

The law does not contemplate the filing of formal pleadings in this class of proceedings, and no great strictness is required in the preparation of the motion, such as are usual and necessary in complaints and answers. It is a sufficient compliance with the requirements of law if the motion specifies with reasonable certainty the relief sought, and the grounds upon which the motion is founded. *Gray v. Robinson*, *supra*; *Urbanski v. Manns*, 87 Ind. 585; *Blizzard v. Blizzard*, 40 Ind. 344.

We have examined the motion filed in this case, and are satisfied that it makes a *prima facie* showing for such relief. We will at this time consider only two of the objections urged to its sufficiency. One is, that the appellant can not have a bill of exceptions of his own preparation corrected,

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and in support of this the case of *Hannah v. Dorrell*, 73 Ind. 465, is cited. All that is said in that case upon the subject is the mere suggestion that if the bill had been prepared by the party asking its correction a different question would be presented. The question was not before the court, and was consequently not decided.

When a bill has been signed and filed, it becomes at once a part of the record, and we know of no rule of law to prevent either party, upon a sufficient showing, from having clerical misprisions corrected. If the party at whose instance the bill was prepared and filed asks for its correction, it might possibly call for a closer scrutiny of the evidence showing that the plaintiff was not guilty of negligence, but it could extend no farther.

The other objection is that it does not show that the proceedings were instituted within two years from filing the bill of exceptions.

We are of the opinion that this is not controlled by section 396, R. S. 1881, but that the court may, in the exercise of one of its inherent powers, long antedating the enactment of our code of procedure, so correct mistakes as to make its record speak the truth. *Miller v. Royce*, 60 Ind. 189. In the latter case a mistake was corrected after ten years, and in *Conway v. Day*, *supra*, a correction was made after the cause had been appealed to this court and affirmed.

After the trial court made an order for the correction and amendment of the bill, the appellee made a motion for a new trial, which was overruled, and that ruling was assigned as error in general term.

We are of the opinion that the making of such motion was unnecessary; that there was, in a strict sense, no trial, but simply a hearing of the motion, and all that was required to bring forward the proceedings for review, as a part of the original case, was a bill of exceptions containing the evidence and showing the rulings made by the court, with

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proper exceptions. *Blizzard v. Blizzard, supra*; *Runnels v. Kaylor*, 95 Ind. 503; *Corwin v. Thomas*, 83 Ind. 110.

We have in the record, disregarding the motion for a new trial, all that is essential to a review of the case made by the evidence.

- The evidence is not conflicting. Two witnesses were examined, and no documents, records or memoranda of any kind were given in evidence. The appellee Tomlinson introduced no evidence.

It appears that the attorney originally employed by the appellant was absent, and that another attorney, who was one of the witnesses in this proceeding, tried the cases for him.

An arrangement was made between counsel, at the trial, by which the bringing of records into court, of which counsel had memoranda, was waived.

The bill of exceptions was drawn by some one other than the attorney who tried the case. The witness does not know, and does not testify, how the error, if there was one in the bill, occurred. It may, however, be inferred that it was occasioned by a mistake made by one of the attorneys who prepared the memoranda of documentary evidence which the plaintiff desired to introduce on the trial.

The other witness, who was a deputy in the clerk's office, testifies that the records in that office do not show that any such execution was ever issued.

If it be conceded, which we do not decide, that proof of the non-existence of the execution was the equivalent of proof made by some "memorandum, memorial paper, record, or other minute of the transaction to amend by, of a date prior to, or at least of equal date with the bill of exceptions," which is required by the authorities (*Morgan v. Hays, supra*), the evidence falls far short of sustaining the order of the court directing the amendment of the bill.

"A court may record a fact *nunc pro tunc*; that is, if the fact existed then, it may record it now; but it can not re-

cord a fact now which did not exist then." *Kirby v. Bowland*, 69 Ind. 290.

A *nunc pro tunc* entry can not be made to put something into a bill of exceptions that was not offered in evidence; or to take something out of a bill that was given in evidence.

A *nunc pro tunc* entry can not be used as a medium whereby a court can change its ruling actually made, however erroneous or under whatever mistakes of law or facts such ruling may have been made. Nor can such entry be made to correct mistakes made by counsel in the introduction of evidence.

The bill of exceptions, as it is in the record, recites the offer of the execution and return in evidence, and that the defendants objected to the introduction of such evidence, stating specifically the grounds of their objections, the overruling of the objections and exceptions noted.

There is nothing in the evidence that even tends to show that this did not occur just as recited in the bill.

The vice, if any, is in the proceedings anterior to the preparation of the bill of exceptions.

Another reason why the amendment of this bill of exceptions ought not to be made is the great length of time that elapsed between the making of the bill and the filing of the motion for its correction. The bill was filed January 14th, 1886, and the petition to amend was not filed until March 14th, 1891, a period of over five years from the preparation of the bill. The transcript was filed in this court by the appellant March 2d, 1889, at which time, if not sooner, the appellant was chargeable with notice of this defect, and after that more than two years were permitted to pass before steps were taken to have the correction made.

A bill of exceptions in a litigated case importing, as it does, "absolute verity," should be prepared with scrupulous care, and where papers and documents are given in evidence, without being produced or identified, neither party occupies

a favorable position in court to ask for a *nunc pro tunc* order to supply omissions, or make other corrections. Where, in addition to this a considerable time is permitted to elapse before applying for such order, after notice of the defect, the application should be refused.

The bill of exceptions being incomplete, and the effort to amend the same ineffectual, no question is presented by the record for our consideration, and, therefore, the judgment is affirmed.

Filed Feb. 16, 1892; petition for a rehearing overruled April 20, 1892.

No. 16,249.

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ET AL.REVIEW OF JUDGMENT.—*Appeal Prayed in Original Case.—Jurisdiction.*—

The fact that an appeal was prayed, but not perfected, does not prevent the lower court from reviewing its judgment.

CONSTITUTIONAL LAW.—*Municipal Board of Police, Appointment.—Act of*

1891.—The Legislature has the power to provide for the appointment of a municipal board of police, and the act of 1891 (Acts 1891, p. 90), is constitutional.

SAME.—*Local Self-Government.—Constabulary.*—In providing for the appoint-

ment of officers connected with the constabulary of the State, there is no invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the State.

SAME.—*Motive of Legislators.*—In passing upon the constitutionality of a law the courts can not inquire into the motive of the legislators.SAME.—*Special Laws.*—Where special laws are not forbidden by the Constitution they may be enacted.SAME.—*Special Laws.—When May be Enacted.*—The Constitution does not prohibit the enactment of special where general laws can not be made applicable.SAME.—*Legislature Exclusive Judge of Necessity for Special Law.*—Whether a general law on any subject not embraced within the enumeration of subjects in section 22, article 4, of the Constitution, can be made applicable is exclusively a legislative question, and the legislative judgment

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will not be reviewed by the courts. McBRIDE and OLDS, JJ., dissent.

SAME—Classification of Laws.—Whether a system of classification adopted by the Legislature, in enacting laws, is a good or vicious one is a question with which the courts have nothing to do.

SAME—Necessary Means.—*Legislature Judge of.*—Where the Legislature has power over a subject, it is the sole judge of the means that are necessary and proper to accomplish the object it seeks to attain.

SAME—Estoppel.—*Repeal of Laws.*—The Legislature can not be estopped, nor can it pass an irrevocable law.

SAME—Title of Act.—*Details.*—If the title of an act covers a general subject the act is valid, no matter how minutely it may go into details germane to such general subject.

MUNICIPAL CORPORATION.—*Vested Right in Office or Public Property.*—A municipal corporation is not clothed with any vested right in a public office, nor does it possess a vested right in public property; and in transferring property and authority from one class of officers to another no vested right of the municipality is invaded.

SAME—Repeal or Alteration of Charter.—The charter of a municipality may be repealed or altered at the will of the Legislature.

From the Vigo Superior Court.

R. B. Stimson, S. C. Stimson, A. M. Higgins, A. C. Harris and L. Cox, for appellant.

J. D. Early, J. Jump, J. E. Lamb, J. G. McNutt and S. R. Hamill, for appellees.

ELLIOTT, C. J.—A preliminary question, arising upon the contention of counsel that the appellees are barred from prosecuting this action, first requires consideration. The facts upon which counsel plant themselves are, in substance, these: The relator filed an information in the nature of a *quo warranto* against the appellees, asserting that they had entered into the office in controversy without right. The trial court sustained the relator, and gave judgment in its favor. The appellees prayed an appeal, but took no further steps to effect an appeal. Subsequently the appellees brought this suit to review the judgment, and obtained the relief they sought. If the appellees had perfected their appeal, there could be no doubt that the case would have been entirely removed from the jurisdiction of the trial court, and that court

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could not have entertained a bill to review the judgment pending the appeal. *Allen v. Allen*, 80 Ala. 154; *Boynton v. Foster*, 7 Metc. 415; *Mitchel v. United States*, 9 Pet. 711; *Ensminger v. Powers*, 108 U. S. 292 (309); *Burgess v. O'Donoghue*, 90 Mo. 299. But here there was no appeal, for this court never acquired jurisdiction. *Holloran v. Midland R. W. Co.*, 129 Ind. 274. As there was no appeal, jurisdiction was not vested in this court, and the trial court did not err in entertaining jurisdiction of the bill of review.

The controversy grows out of the claim made by the appellees to the office of police commissioner of the city of Terre Haute, to which they assert title under the act of March 4th, 1891. Acts of 1891, p. 90. The relator denies their right to the office, affirming that the act under which they assert title is invalid, because it violates the provisions of the Constitution.

The power of the Legislature to provide for the appointment of members of a municipal board of police has been affirmed in every instance in which it has been so challenged and presented as to require the judgment of the courts. Those courts which hold to the doctrine that control of matters of purely local concern can not be taken from the people of the locality place their decisions upon the ground that the selection of peace officers is not a local matter, but is one of State concern, inasmuch as such officers belong to the constabulary of the State. But while the reasoning of the courts is diverse, the ultimate conclusion reached by all the cases is the same. *City of Indianapolis v. Huegele*, 115 Ind. 581; *State, ex rel., v. Denny*, 118 Ind. 382; *State, ex rel., v. Denny*, 118 Ind. 449; *City of Evansville v. State, ex rel.*, 118 Ind. 426; *State, ex rel., v. Blend*, 121 Ind. 514; *People, ex rel., v. Draper*, 15 N. Y. 532; *People, ex rel., v. Shepard*, 36 N. Y. 285; *People, ex rel., v. Mahaney*, 13 Mich. 481; *State, ex rel., v. Covington*, 29 Ohio St. 102; *Police Commissioners v. City of Louisville*, 3 Bush, 597; *State, ex rel., v. Hunter*, 38 Kan.

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578 ; *Mayor, etc., v. State, ex rel.*, 15 Md. 376 ; *State, ex rel., v. Seavey*, 22 Neb. 454.

In our judgment the act here assailed may be upheld upon the ground that it does not trench upon the right of local self-government. We put our decision on this point upon the principle that in providing for the appointment of officers connected with the constabulary of the State there is not an invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the State.

A municipal corporation is not clothed with any vested right in a public office ; nor, indeed, does it possess a vested right in public property. It has been long and firmly settled that the charters of public corporations may be repealed or altered as the Legislature, in the exercise of its constitutional powers, deems proper. *Sloan v. State*, 8 Blackf. 361 ; *Meriwether v. Garrett*, 102 U. S. 472 ; *Coffin v. State, ex rel.*, 7 Ind. 157 ; 1 Dillon *Municipal Corp.* (4th ed.), sections 61, 63, 71. See, also, authorities collected in *Elliott Roads and Streets*, p. 320.

The rule stated by us fully and effectually disposes of the argument of counsel that the act is void because it impairs the vested rights of the city of Terre Haute, as it is quite clear that in transferring property and authority from one class of officers to another no vested right of the municipality was invaded.

The act contains this provision : " That in all cities having an enumeration of children between the ages of six and twenty-one years, of 14,000 and over, as shown by the official returns of such enumeration, made by the several county superintendents of this State to the superintendent of public instruction, for the year 1890, there shall be established within and for said city, a board of metropolitan police, to consist of three commissioners, to be appointed by the Governor, secretary, treasurer and auditor of state, or a majority of them." The appellant's counsel argue, with sig-

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nal ability, that the Legislature in selecting the standard of classification has chosen an arbitrary, unreasonable and ineffective one, and that, therefore, the act must fall because it is a special one, and is of the class of special legislation interdicted by the Constitution. It may possibly be true, as counsel assert, that the standard of classification was adopted for the sole purpose of bringing a single municipality under the act, and that the motives of the Legislature were not commendable; but, granting all this, yet no reason is supplied for condemning the law, for the courts can not inquire into the motives of the legislators. All that the courts can rightfully do is to ascertain and decide whether any constitutional provision is violated. Their power extends only to an investigation and determination of the question whether the law is or is not unconstitutional.

The subject to which the act under consideration is addressed is not one upon which the Legislature is forbidden to enact special laws. If the subject were one of those enumerated in the section which prohibits the enactment of special laws, we should have a very different case from the one before us; but it is not within the classes enumerated, nor can it be brought within the enumeration save by interpolating a provision not written in the Constitution. It is, of course, known to all that where special laws are not forbidden they may be enacted. *Thorpe v. Rutland R. R. Co.*, 27 Vt. 140; *Adams v. Howe*, 14 Mass. 340; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147 (161). If the enactment of such a law as the one before us is forbidden, it must be by virtue of section 23 of article 4 of the Constitution, for the subject embraced in the act is not included in the enumeration found in the preceding section. But section 23, as has been again and again decided, does not prohibit the enactment of special laws, where general ones can not be made applicable. It has also been repeatedly held that whether a general law can be made applicable to a particular subject is exclusively a legislative question, and it necessarily results that if the

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question is legislative the whole matter, with all its incidents, must be determined by the Legislature. It has been steadily held since the decision in *Gentile v. State*, 29 Ind. 409, that the Legislature is the exclusive judge of whether a general law can be made applicable to a subject not enumerated in section 22 of article 4 of the Constitution. In that case it was said: "As the General Assembly, then, have the power to pass local laws where general ones can not be made applicable, and as the Constitution does not declare, except in the cases enumerated in section 22, in what particular cases general laws can be made applicable, or designate the proper subjects of local legislation, who is to determine when a law may be local, or when a general law can be properly applied to the particular subject? Most unquestionably, those who make the law are necessarily required, in its enactment, to judge and determine, from the nature of the subject, and the facts relating to it, whether it could properly be made general, and of uniform operation throughout the State." Among the many cases affirming and enforcing the doctrine so emphatically declared in the case from which we have quoted are these: *City of Evansville v. State, ex rel.*, 118 Ind. 426 (433); *Wiley v. Corporation of Bluffton*, 111 Ind. 152; *Johnson v. Board, etc.*, 107 Ind. 15 (22); *Kelly v. State, ex rel.*, 92 Ind. 236; *Stuttsman v. State*, 57 Ind. 119; *Vickery v. State*, 50 Ind. 461; *Marks v. Trustees, etc.*, 37 Ind. 155; *State, ex rel.*, v. *Tucker*, 46 Ind. 355; *Clem v. State*, 33 Ind. 418; *Longworth v. Common Council, etc.*, 32 Ind. 322; *State v. Boone*, 30 Ind. 225; *State v. Hockett*, 29 Ind. 302. It is simply and absolutely impossible to escape the force of the decision in *Gentile v. State, supra*, for the question was there made and there decided. The question was before the court for decision, and judgment was given upon it. This has been affirmed in many cases in terms as strong as the pen can frame. In the case of *City of Evansville v. State, ex rel.*, *supra*, the question came before the court upon an act relating to precisely the same subject as that covered by the act now before us.

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There is no room for doubt as to what was there decided, nor is it possible to doubt that what was there decided is controlling here. What was there said upon the point, and all that was said, is this: "To the objection that the act is in violation of section 23, article 4, the answer must be that the question is one for the Legislature, and not for the courts." It is not easy to conceive how there could be a stronger or clearer decision that the whole question is legislative than that in the case from which we have quoted, but other cases are equally strong and clear. The court directly applied the doctrine of *Gentile v. State, supra*, to the amendment of a town charter in the case of *Wiley v. Corporation of Bluffton, supra*, and in *Johnson v. Board, etc., supra*, applied that doctrine to a legalizing act, saying: "And hence many local and special laws have been upheld and the rulings have been, that where the case does not fall within the cases enumerated in section 22, it is for the Legislature to determine whether or not a general law can be made applicable, and that the legislative judgment upon that question will not be reviewed by the courts."

In *Vickery v. Chase, supra*, BUSKIRK, J., delivering the opinion of the court, said: "Besides, it has been repeatedly held by this court, that 'the Legislature is the exclusive judge, whether a law on any subject not enumerated in section 22 of article 4 of the Constitution can be made general and applicable to the whole State.'" He also said that the doctrine "is too firmly established to be now changed, and is decisive of the case in judgment, so far as it is affected by section 23 of article 4." Earlier cases had, however, declared the question to be unalterably settled. It can not, therefore, be doubted that the firmly settled rule, as fully understood and directly enforced by a long and unbroken line of decisions, is that whether an act relating to a subject not embraced in section 22 of article 4 can or can not be made general is exclusively a legislative question. But other courts than ours have declared, in terms not less decided and explicit

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than those employed by our own court, that the question must be determined by the Legislature, and that the legislative decision is beyond judicial review. *Brown v. City of Denver*, 7 Col. 305; *Carpenter v. People, ex rel.*, 8 Col. 116; *State, ex rel., v. County Court of Boone*, 50 Mo. 317; *State, ex rel., v. County Court of New Madrid*, 51 Mo. 82; *Hall v. Bray*, 51 Mo. 288; *State, ex rel., v. Hitchcock*, 1 Kan. 178; *Beach v. Leahy*, 11 Kan. 23; *Davis v. Gaines*, 48 Ark. 370.

All of the cases referred to are influential, because the decisions were made upon Constitutions like ours; some of them are especially so, because they affirm, as our own court has so often done, that the decision in *Gentile v. State, supra*, authoritatively adjudges that the question is purely and exclusively a legislative one.

The Constitution has been authoritatively construed by the courts. The judicial work has been done, and the question here is whether we shall undo that work, not whether we will decline to give the constitutional provision a construction. We abide by the rule established; we adhere to the construction so long held to be correct; and, in doing this, leave no duty unperformed. If we should undo the work that has been done, and depart from the long settled doctrine, we should, indeed, turn from the line of duty, and take the foundation from scores of curative and legalizing acts, as well as from many other laws that have long passed unchallenged. But it by no means results from our decision here, nor from the decisions in the cases we follow, that special laws may be enacted upon all subjects connected with towns or cities.

The decisions put at rest the question whether or not the Legislature can determine whether a general law, upon a subject not enumerated in section 22 of article 4 can or can not be made applicable, by affirming that it is exclusively a legislative question, and the court must and does so adjudge. If the question is legislative, then it is indisputably true that it is excluded absolutely and entirely from the domain

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of the judiciary. It is inconceivable that the question can be dissected into fragments, and one part assigned to one department of government and another part to a different department. Under our system of government the departments are distinct and independent; there is no such thing as a power partly judicial and partly legislative. *Greenough v. Greenough*, 11 Pa. St. 489; *State, ex rel., v. Noble*, 118 Ind. 350; *Wright v. Defrees*, 8 Ind. 298; *State, ex rel., v. Denny*, 118 Ind. 382 (386); *State, ex rel., v. Denny*, 118 Ind. 449; *Hovey v. State, ex rel.*, 127 Ind. 588.

As the question whether a general law can be made applicable is exclusively legislative, the incidents of the main questions are necessarily and entirely legislative. Where the principal subject belongs, there the incidents belong. Means, methods and the like belong to the department that is invested with power over the general subject. It is for that department to make choice of modes and means, and, as the Supreme Court of the United States has said, "it is master of its own discretion." *Legal Tender Cases*, 12 Wall. 457 (561); *Hancock v. Yaden*, 121 Ind. 366; *State, ex rel., v. Haworth*, 122 Ind. 462 (467).

Where the Legislature has power over a subject, it is the sole judge of the means that are necessary and proper to accomplish the object it seeks to attain. *Legal Tender Cases*, 110 U. S. 421. The courts can not assume control of the general subject or any of its incidents. As Judge Cooley says: "The moment a court ventures to substitute its own judgment for that of the Legislature, in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion will alone measure the extent of its interference." Cooley Const. Lim. (4th ed.) 129. The rule is that where a subject lies wholly within the legislative field, into that field the judiciary can not enter. It must, therefore, be true that where a subject is committed to the legislative judgment, the

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Legislature is invested with power to ~~determine~~ the mode of enacting statutes. Whether the legislation shall be by original or by amendatory statute is for the Legislature to decide. *Wiley v. Corporation of Bluffton*, *supra*; *City of Evansville v. Summers*, 108 Ind. 189; *Warren v. City of Evansville*, 106 Ind. 104; *Chamberlain v. City of Evansville*, 77 Ind. 542; *City of Evansville v. Bayard*, 39 Ind. 450; *Longworth v. Common Council, etc.*, *supra*; *Brown v. City of Denver*, *supra*.

It is doubtless true that where the Constitution requires the enactment of a general law, the attempt to amend a general law by a special one would be fruitless; but where the subject is one which does not require a general law, the question as to what form the legislation shall take is exclusively a legislative one. Here the subject is not one requiring a general law, and hence special amendatory laws may be enacted.

Whether the system of classification adopted by the Legislature is a good or a vicious one is a question with which the courts have nothing to do, inasmuch as the entire subject lies within the legislative dominion, and is excluded from that of the judiciary. If the subject were one demanding a classification, a discussion of that adopted in this instance would be proper; but, as the subject is exclusively legislative, it is not for the courts to inquire whether the Legislature has acted wisely or unwisely in selecting a standard of classification. Many things may be done by the Legislature that the courts can neither control nor rebuke. Our duty is done and our power exhausted when we adjudge that the general subject, with its incidents and appendages, is one for legislative consideration and decision. If the Legislature has erred in its judgment, its error must be corrected and rebuked by the electors of the State, not by the courts.

The law-making power can not be estopped. Within constitutional limits it is sovereign. Irrepealable laws can not be enacted. *Cooley Const. Lim.* 146, 148, 343. It neces-

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sarily results from these elementary principles that the Legislature, having tried one mode of legislation, is not precluded from trying another. *State, ex rel., v. Haworth, supra.* The discussion comes back at last to the question, is the subject one for legislative consideration and judgment? for, if it is, modes and means must be selected by the Legislature, not by the judiciary.

The argument that the title of the act of 1891 is insufficient is fully answered by the adjudged cases. It is settled beyond controversy that if the title covers a general subject, the act is valid, no matter how minutely it may go into details germane to that general subject. *Shoemaker v. Smith*, 37 Ind. 122; *Bitters v. Board, etc.*, 81 Ind. 125; *Crawfordsville, etc., T. P. Co. v. Fletcher*, 104 Ind. 97; *Barnett v. Harshbarger*, 105 Ind. 410; *City of Indianapolis v. Huegele*, 115 Ind. 581.

It is insisted that the act of 1891 is so uncertain as to be incapable of enforcement. This contention rests upon the ground that it can not be ascertained to what city the act will apply. This position is untenable. A public law provides for the enumeration of persons between the ages of six and twenty-one years, and the enumeration is for a great public purpose, affecting high public interests. *Elliott's Supp.*, section 1273; sections 4441, 4450, 4472, 4475, R. S. 1881. These are, therefore, official acts to which the court may resort for information. *State, ex rel., v. Gramelspacher*, 126 Ind. 398, and authorities cited p. 403. Those acts are required by legislative enactment, and that enactment was, we know, passed in obedience to the constitutional provision enjoining upon the Legislature the duty of encouraging and providing for a great educational system. We are far within the authorities in holding, as we do, that for the purpose of upholding the statute, and giving it effect, we may justly declare that there is here no such uncertainty as requires its overthrow and the defeat of the legislative purpose.

The decision in *State, ex rel., v. Blend*, 121 Ind. 514, fully

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disposes of the point that immunities are conferred upon a favored class of citizens to the exclusion of others, by declaring, as it does that such provisions may be eliminated without impairing the validity of the act in so far as it relates to questions such as those presented by this record.

Judgment affirmed.

Filed Dec. 17, 1891; petition for a rehearing overruled Feb. 20, 1892.

DISSENTING OPINION.

MCBRIDE, J.—The opinion of the majority of the court affirms the validity of the act of March 4th, 1891, which purports to be an amendment to the act of March 5th, 1883, Elliott's Supp., section 705 *et seq.*, known as the "Metropolitan Police" law. As I understand the opinion, it is based mainly upon the assumption that the case of *Gentile v. State*, 29 Ind. 409, together with a long line of cases since decided, purporting to follow it, establish the proposition that section 23 of article 4 of the Constitution of the State, which is as follows: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform application throughout the State,"—leaves it to the Legislature alone to determine whether a law on any given subject, not enumerated in section 22, can be made applicable to the whole State, and that the determination and judgment of the Legislature in such cases is conclusive, and not subject to review by the courts. This premise being assumed, the court declines to entertain or consider the objection that the act in question is in violation of the provision above quoted from the Constitution, holding that by the rule of *stare decisis* that question is put at rest.

While entertaining the most profound respect for the learning and ability of my associates, I find myself unable to concur in the conclusion reached by them. I have not considered, nor have we any right to consider, any question as to the

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wisdom of this legislation, or the motives of the Legislature in enacting it. We are bound to assume that they all acted from pure motives, and that none of them so far forgot their duty, as argued by counsel, that they sought to gain a partisan advantage instead of to advance the public good. We can properly consider but one question—is the law such a law as the legislature has the power, under the Constitution, to enact? If it is, all questions as to its wisdom or its propriety belonged solely to the Legislature. Nor can we legitimately consider whether or not the framers of the Constitution acted wisely in placing the power of construing it where they did.

We can only inquire, where has the Constitution placed the power of construing this one of its provisions? If in the Legislature, it is well, and they alone must exercise it. If in the courts, we *dare* not shrink from discharging the duty.

The Constitution is the supreme law, enacted by the people, and, under Federal authority, constitutes the only limitation upon legislative power. It is our duty to support and faithfully to construe it.

The following are the principal grounds upon which I am compelled to dissent from the principal opinion.

1st. In so far as the rule which it is assumed has been declared in *Gentile v. State, supra*, is concerned, the question was not necessarily before the court in that case. In my opinion, all that was there said upon that subject was *obiter dictum*.

I am impelled to this conclusion because the court, in deciding that case, expressly decided that the law then under consideration was *general*, and *not* special. It would seem to be clear that, if the law was general, it presented no question as to the power of the Legislature to decide upon the necessity for a special law.

2d. No case has ever since that time been decided by this

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court which necessarily involved that question, or necessarily required the court to decide it.

It is true the case has been frequently cited and quoted, and in many cases that doctrine has been asserted as affording one of the grounds upon which the case could be decided; but a careful examination of all those cases will, I think, show that the court in each case affirms the existence of other grounds sufficient to lead the court to the same conclusion. Those cases, and, indeed, all of the cases decided by this court since, and including, the case of *Gentile v. State*, *supra*, involving any question as to the power of the Legislature in the enactment of local legislation, may be grouped as follows:

1st. Those where this court has held that the law assailed is in fact general, and not special. *Gentile v. State*, *supra*; *State v. Hockett*, 29 Ind. 302; *State v. Boone*, 30 Ind. 225; *Stuttsman v. State*, 57 Ind. 119; *Hanlon v. Board, etc.*, 53 Ind. 123; *Groesch v. State*, 42 Ind. 547; *City of Indianapolis v. Huegele*, 115 Ind. 581; *State, ex rel., v. Reitz*, 62 Ind. 159; *City of Evansville v. State, ex rel.*, 118 Ind. 426; *State, ex rel., v. Blend*, 121 Ind. 514, and many other cases.

2d. Those where the Constitution expressly authorizes special legislation; as, *Longworth v. City of Evansville*, 32 Ind. 322; *Wiley v. Corporation of Bluffton*, 111 Ind. 152; *Clem v. State*, 33 Ind. 418; *Vickery v. Chase*, 50 Ind. 461, and other similar cases.

3d. Where the subject of the legislation is so obviously local that it is self-evident that the law enacted must of necessity be local, and that a general law can not be made applicable. *Marks v. Trustees, etc.*, 37 Ind. 155; *Kelly v. State, ex rel.*, 92 Ind. 236; *Johnson v. Board, etc.*, 107 Ind. 15; *Mount v. State, ex rel.*, 90 Ind. 29, and many other cases similar in principle.

In this class would fall all of that class of legislation known as "curative statutes." Especially those legalizing the incorporation of towns, and the acts of their boards of

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trustees, where their validity is rendered doubtful by some neglect or informality on the part of some officer or other person. As a rule, in each case the specific act of negligence or informality, and consequent evil to be remedied, is so plainly local as to bring it within the rule stated in *Marks v. Trustees, etc., supra*. In that case WORDEN, J., while referring to the Gentile case, expressly refrained from following or expressing an opinion upon it, placing the decision upon the ground above stated, thus recognizing as correct the principle that where the subject of the legislation is purely local there is no necessity for invoking that rule.

If the foregoing grouping of cases is correct (about which I have no doubt), and it should now be decided that the rule laid down in *Thomas v. Board, etc.*, 5 Ind. 4, and *Maize v. State*, 4 Ind. 342, was the correct rule, and that *Gentile v. State, supra*, was not correctly decided, it would not result in overthrowing a single adjudicated case,—not even *Gentile v. State, supra*, itself; that case being, as the court there holds, correctly decided on other grounds. Indeed, it may be questionable if the statement in that case has in this State ever been adopted under such circumstances as made it authority in the true sense of that term.

In the original case it was certainly *obiter dictum*. The maxim of *stare decisis* applies only to points arising and actually decided in causes. Sutherland Stat. Const., section 320.

A *dictum*, as long as it remains a mere *dictum*, does not pass into precedent, and is not authority. Wells Res Adjudicata and Stare Decisis, section 583.

It is undoubtedly true that a *dictum*, if it be adopted and declared as the law in a case where the question is properly involved, and before the court for adjudication, becomes authority. It then ceases to be a *dictum*. But the mere fact of its repetition and recognition, in cases which do not require or authorize an actual adjudication upon the principle involved, can not change its character or make it authority.

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As long as it remains an extra-judicial utterance, it can never raise the bar of *stare decisis*.

For this court to return to the true rule and disapprove the error of the Gentile case, while it would involve the disapproval of a similar declaration in many cases, would not, as I have said, involve the actual overruling of any case, for the reason that the decisions do not rest upon that ground alone. Nor would it unsettle a title, or affect the validity of any other act of the Legislature.

I fully appreciate the value of the rule of *stare decisis*. It is of the utmost importance that there be permanence and stability in the rules of law, and that principles of law authoritatively announced by courts of last resort, and long acquiesced in, should not be lightly set aside. When, however, it becomes apparent that there has been error, the consequences of which may be serious and harmful, unless the erroneous rule has become a rule of property, courts seldom hesitate to retrace their steps and correct the wrong. This is especially true when the error consists in a misinterpretation of the fundamental law, as in such cases there is no other available remedy. The Constitution being the measure by which alone we must determine the validity of laws, if we err in interpreting the Constitution, the error, while persisted in, can have no remedy short of a change in the Constitution itself by the people. Therefore, this court, in the case of *Robinson v. Schenck*, 102 Ind. 307 (320), speaking by ELLIOTT, J., said: "The rule of *stare decisis* has been held not to apply with its usual force and vigor to decisions upon constitutional questions. In a case not unlike the present it was decided that 'the rule of *stare decisis* applies when a decision has been recognized as a law of property, and conflicting demands have been adjusted, and contracts made with reference to and on faith of it; but not to questions involving the construction and interpretation of the organic law, the structure of the government, and the limitations upon the leg-

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islative and executive power.' *Willis v. Owen*, 43 Tex. 41." Another court announces a similar conclusion, and assigns this among the reasons for its conclusion: "That upon a constitutional question as to which we have no doubt, we can not follow a former decision against our present conviction, for the reason that to do so would violate our oath to support the Constitution." *Kneeland v. City of Milwaukee*, 15 Wis. 454 (520).

It is true that the rule of the *Gentile* case has been recognized by the courts of some of the other States, while it has been repudiated by some.

The apparent recognition in some of the States, however, is due to the fact that in some of the State constitutions are provisions expressly submitting the question of the applicability of general laws to the judgment of the Legislature. Of course where that is done there is no room for controversy.

It is also significant to note in this connection the constant and persistent recurrence of this question, and its suggestion to and by this court, during all the years, from the decision of *Gentile v. State*, *supra*, down to the present, together with the care taken by the Legislature, in framing laws where a question of this character might arise, to give them at least the form of general laws. It indicates a general feeling in the bar, the courts, and the Legislature itself that the question was not foreclosed by adjudication. If the law was indeed adjudicated and settled as now claimed, and if the adjudication was so sweeping and conclusive, all questions as to special legislation on subjects not enumerated in section 22, article 4, of the Constitution are mere questions of legislative expediency, to be determined by the exercise of legislative discretion alone, and there has not been since the *Gentile* case was decided, in 1868, even a possibility of finding room for judicial interpretation or construction relating to the exercise of that legislative discretion.

3d. Sections 22 and 23 of article 4 of the Constitution

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were enacted by the people as restrictions upon the power of the Legislature.

A constitutional restriction upon legislative action is utterly without vitality or binding force, unless the Constitution clothes some branch of the State government with the power to enforce it.

That power is, by both Federal and State constitutions, lodged in the courts. They alone can make the ultimate decision as to the constitutionality of *all* legislative acts, whenever those acts become the subject of judicial controversy.

The force of the foregoing propositions can only be escaped by denying that section 23 is a restriction upon legislative action. If it is not, it is mere surplusage and should be stricken from the Constitution. The Constitution confers no power of any character upon the Legislature. So far as that body is concerned, the *only* effect of the Constitution is to limit, and not to confer or extend power.

The debates in the constitutional convention show that much time was there spent in discussing the evil of special legislation, and that sections 22 and 23 were inserted to remedy that evil.

In *Maize v. State*, 4 Ind. 342, decided at the November term, 1853, this court said of these sections: "These provisions are all in the nature of restrictions on the legislative authority. * * * The evil to be remedied by sections 22 and 23, above quoted, was the local and special legislation so prevalent under the old system. It had grown into such magnitude that counties, townships, and even school and road districts, had special laws for the management of their local affairs. * * * To remedy these evils—to restore the State from being a coterie of small independencies, with a body of local laws, like so many counties palatine, to what she should be, and was intended to be, a unity, governed throughout her borders on all subjects of common interest, by the same laws, general and uniform in their operation—

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the restrictions in sections 22 and 23 were embodied in the Constitution."

In *Thomas v. Board, etc.*, 5 Ind. 4, decided at the May term, 1854, the court said: "It is, however, insisted that the Legislature have decided a general law to be inapplicable to the case under consideration; that from this decision there is no appeal; and that, therefore, it is not competent for this court to decide upon the validity of the law in question. If that position be correct, the 23d section has no vitality; nor is there any reason why it should have a place in the Constitution. It would impose no restriction upon the action of the Legislature, nor confer any power which that body would not possess in the absence of such a provision. If that section permits the Legislature to enact a special or local law *ad libitum*, in any case not enumerated, the principle involved would deprive this court of all authority to call in question the correctness of a legislative construction of its own powers under the Constitution. We are not prepared to sanction this doctrine. The maxim 'that parliament is omnipotent' has no place in American jurisprudence.

"Whether the Legislature have, in the case at bar, acted within the scope of their authority, is, in our opinion, a proper subject of judicial inquiry."

These two cases were decided so soon after the adoption of the new Constitution that they may be regarded as practically contemporaneous with its adoption. One of the judges composing the court at that time, and concurring in the opinion in *Thomas v. Board, etc.*, *supra* (the late Governor Hovey), was also a member of the convention which framed the Constitution. The interpretation thus given to these provisions of the Constitution stood, apparently acquiesced in and unchallenged, for fifteen years, until it was questioned and, it is claimed, overruled by *Gentile v. State, supra*.

A writer on this subject says: "A construction of a Constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years after-

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wards, is never to be lightly disregarded, and is often conclusive." Sutherland Statutory Construction, section 307. Many eminent authorities are cited in support of the text.

In *Gentile v. State*, *supra*, the court declares that section 23 is a restriction upon legislative power, and "was intended to prohibit the passage" of local laws, where a general law could be made applicable, but holds that the actual restriction and prohibition is to be found in the consciences of the individual legislators. The so-called restriction thus becomes a mere admonition. The evident object sought to be attained by the adoption of this provision of the Constitution was to *prevent*, or, as the court says in that case, to *prohibit*, local and special legislation—not simply to advise against it.

The language is mandatory: "Where a general law can be made applicable, all laws *shall* be general, and of uniform operation throughout the State." To say that the Legislature is the sole judge, whether in a given case a general statute can be made applicable, makes it merely monitory, and not mandatory. Such a rule is a clear and wide departure from the general rule that the courts are the sole final tribunals authorized under our system of government to pass upon the constitutionality of laws. It can only be sustained, as I have heretofore said, by denying the restrictive character of section 23. There is no escape from the conclusion that if that section is to operate as an actual restriction, the courts must ultimately apply it.

Judge Story says: "The power to construe the Constitution is a judicial power." 1 Story Constitution, section 376. "The universal sense of America has decided that in the last resort, the judiciary must decide upon the constitutionality of the acts and laws of the general and State governments, so far as they are capable of being made the subject of judicial controversy." 2 Story Const., section 1576. See, also, to the same effect, 1 Kent Com., 420-426.

Chief Justice MARSHALL says: "The judicial power of every well constituted government must be co-extensive with

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the legislative, and must be capable of deciding *every judicial question which grows out of the Constitution and laws*. If any proposition may be considered as a political axiom, this, we think, may be so considered." *Cohens v. Virginia*, 6 Wheaton, 264. See, also, *Bank of Hamilton v. Dudley*, 2 Peters, 492, where he says: "The judicial department of every government is the rightful expositor of its laws; and emphatically of its supreme law."

Of this power of the courts Judge Cooley says: "The right and the power of the courts to do this are so plain, and the duty is so generally—we may almost say universally—conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject." Cooley Constitutional Limitations (3d ed.), 45.

The Supreme Court of Pennsylvania, per GIBSON, C. J., says: "It is idle to say the authority of each branch is defined and limited in the Constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention. From its every position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency." *De Chastellux v. Fairchild*, 15 Pa. St. 18.

Daniel Webster says: "The Constitution being the supreme law, it follows, of course, that every act of the Legislature, contrary to that law, must be void. But who shall decide this question? Shall the Legislature itself decide it? If so, then the Constitution ceases to be a legal, and becomes only a moral restraint on the Legislature. If they, and they only, are to judge whether their acts be conformable to the Constitution, then the Constitution is admonitory or advisory only; not legally binding; because, if the construction

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of it rest wholly with them, their discretion, in particular cases, may be in favor of very erroneous and dangerous constructions. Hence the courts of law, necessarily, when the case arises, must decide upon the validity of the particular acts. * * *Without this check, no certain limitation could exist on the exercise of legislative power.*" The Independence of the Judiciary, Webster's Works, vol. 3, p. 30.

In view of the contention in this case, the language of Mr. Webster is especially significant and forceful. Quotations of similar tenor from equally eminent authority might be greatly extended.

I confess that I do possess profound respect for the sages of the law above quoted, whose eminence as jurists and whose grasp of the principles of statesmanship were leading factors in laying and cementing the foundations of our national stability. When I find them asserting the power and duty of the courts, not only to construe, but to apply and enforce *all* constitutional restrictions and limitations upon legislative power, and find as the solitary dissent from that doctrine the rule here asserted, I am constrained to follow their lead. They declare that the courts alone must apply the measure of the Constitution to all laws. They assert the necessity for an independent power, able and willing to enforce the limitations upon legislative power, and that without such check no such limitation can exist. They tell us that that power exists in the courts alone. Section 23 does impose a limitation or restriction upon that power, and I am compelled to choose between their opinion that the courts must enforce the limitation, and the opinion which we are here asked to reaffirm, that the Constitution has provided no tribunal for its enforcement but the consciences of the individual legislators. On *my* conscience I must follow the former.

4th. The invalidity of the law in question, as an act of special legislation (if it is special), is, however, easily determinable upon other grounds, entirely consistent with *Gen-*

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tile v. State, supra, and requiring no disapproval of the rule we have been considering.

That rule is, that the Legislature is the sole judge of the necessity for a special law in any given case. Hence, its enactment of a special law is a legislative declaration that a general law can not in that case be made applicable, and such declaration is final and conclusive. The act here in question purports to be a *general*, and not a special law. It is evident that the Legislature purposely gave it that form. If the enactment of a local law is a conclusive legislative determination that a local law is necessary, the enactment of that which purports to be a general law is equally conclusive as a legislative declaration that a general law can be made applicable, and that a special law is not necessary. The question does not rest here, however.

An author who assumes the existence of the rule laid down in *Gentile v. State, supra*, and gives it as being settled by authority, lays down the following additional rule: "If a general law exists which is applicable to a subject, the question whether such a law can be made applicable is resolved. The Legislature has by the enactment of a general law practically decided the question. Hence if, while such a general law is in force, a special or local law is passed affecting the same subject and modifying the general law, the question of its validity is judicial; it will be held invalid in the case supposed, for an applicable general law being in existence, it is no longer a question whether such a law can be made applicable; therefore the special or local law is prohibited." Sutherland Stat. Con., section 118.

The cases cited by the author fully sustain the text. It is also sustained by *Robinson v. Perry*, 17 Kan. 248; *Darling v. Rodgers*, 7 Kan. 592; *Gray v. Crockett*, 30 Kan. 138.

I believe no case exists conflicting with this principle, nor does it conflict with any established rule of law.

The act of the Legislature here in question was enacted as an amendment to the "metropolitan police" law of 1883.

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While this court has firmly maintained the right of local self-government in municipal corporations, it has recognized as an exception to the exercise of that right the power of the State to prescribe and control the manner of selecting the constabulary, including the police force of a city.

The act of 1883 was enacted in the legitimate exercise of that power. While it only applies to certain cities in the State, those cities being classified according to population, the classification adopted has, as will presently appear, been recognized as legitimate, as applied to such a law, and the law itself is general, and not special or local. Its validity has been several times recognized by this court. *City of Indianapolis v. Huegele, supra*; *State, ex rel., v. Blend, supra*; *State, ex rel., v. Denny*, 118 Ind. 382; *City of Evansville v. State, ex rel.*, 118 Ind. 426.

Therefore, by legislative declaration, and by judicial recognition, it is, and was, when the act now in controversy was adopted, conclusively settled that a general law could be made applicable to the subject of this particular legislation, the act in question being a mere amendment to a general law, then in operation, and which had been in successful operation for years. There was no room for any legislative adjudication as to the applicability or non-applicability of a general law.

The question remains, in either case, is the law now under consideration general, or is it special and local in its character?

The several subdivisions of the State, and its municipalities, may be classified, and laws enacted which will affect differently the several classes, and thus be in a sense local, and yet such laws are general within the meaning of the Constitution.

Thus, in Pennsylvania, where the Constitution prohibited special legislation for regulating the affairs of counties, cities, etc., the Supreme Court of that State in *McCarthy v. Commonwealth, ex rel.*, 110 Pa. St. 243 (246), says: "It is admitted

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that classification, even when not specially recognized by nature, custom, the laws of trade, or the constitution, must in certain cases, be adopted *ex necessitate*. * * General legislation for all the cities of the Commonwealth as a single class, having been regarded as impossible, the Legislature first divided these municipalities into several distinct classes, and then provided laws and regulations adapted to each class. This, as we have seen, was recognized as legitimate and proper."

In *Nichols v. Walter*, 37 Minn. 264, it is said: "It must be conceded that where a general law, uniform in its operation, is required, the law is none the less general and uniform because it divides the subjects of its operation into classes, and applies different rules to the different classes. For the purpose of efficient and beneficial legislation it is often necessary to do so." See, also, *Hanlon v. Board, etc.*, *supra*.

As we have elsewhere said, in recognition of this principle, this court has sustained, as general, laws classifying counties according to population for the grading of salaries of certain county officers, and the metropolitan police law itself similarly classifies cities. That a law classifying the objects of legislation may, indeed, be general, but not within the inhibition of sections 22 and 23 of article 4, it is not enough that the classification be made merely in accordance with certain features common to all, but the classification must bear some definite relation to the purpose sought to be accomplished by the legislation.

A mere arbitrary classification, based on features which, although common to all, bear no relation to the subject-matter of the legislation, will not suffice.

This question has probably received more thorough consideration from the Supreme Court of New Jersey than from the court of any other State. In *Warner v. Hoagland*, 51 N. J. L. 62 (68), it is said, quoting approvingly from an earlier decision by the same court: "A law is to be re-

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garded as general when its provisions apply to all objects of legislation, distinguished alike by qualities and attributes which necessitate the legislation or to which the enactment has manifest relation. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class."

In the case of *State, ex rel., v. Hammer*, 42 N. J. L. 435, it was urged upon the court that a certain law did not contravene a constitutional provision prohibiting the enactment of local or special laws to regulate the internal affairs of towns and counties, because it was general in its terms, and embraced "all of a group of objects having characteristics sufficiently marked, and distinct to make them a class by themselves."

In a well-considered opinion the court held the law invalid, as in fact special. The court says, page 440: "Plainly, a law may be general in its provisions, and may apply to the whole of a group of objects, having characteristics sufficiently marked and important to make them a class by themselves, and yet such law may be in contravention of this constitutional prohibition. Thus, a law enacting that in every city in the State in which there are ten churches, there should be three commissioners of the water department, with certain prescribed duties, would present a specimen of such a law, for it would sufficiently designate a class of cities, and would embrace the whole of such class, and yet it does not seem to me that it could be sustained by the courts. If it could be so sanctioned, then the constitutional restriction would be of no avail, as there are few objects that can not be arbitrarily associated, if all that is requisite for the purpose of legislation is to designate them by some quality, no matter what that may be, which will so distinguish them as to mark them as a distinct class. But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of

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such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation."

The Supreme Court of Minnesota, in *Allen v. Pioneer-Press Co.*, 40 Minn. 117-120, says: "Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy growing out of the condition or business of such class."

In *McCarthy v. Commonwealth*, *supra*, the Supreme Court of Pennsylvania, speaking of arbitrary or illusory classification, says: "If, indeed, such legislation were to be recognized as legitimate, vain would be the constitutional prohibition of local or special laws. But little ingenuity in the way of so-called classification would be necessary in order to isolate every single county, borough, ward, township and school district in the State and provide for each its own local code."

See, also, *Randolph v. Wood*, 49 N. J. L. 85; *Paul v. Judge, etc.*, 50 N. J. L. 585; *State Board, etc., v. Central R. R. Co.*, 48 N. J. L. 146 (278); *Sutherland Statutory Construction*, sections 127, 128, 129 and cases cited; *Zeigler v. Gaddis*, 44 N. J. L. 363; *Bone v. State*, 86 Ga. 108; *Mortland v. State, ex rel.*, 52 N. J. L. 521; *State v. Board, etc.*, 52 N. J. L. 302.

In *State, ex rel., v. Boyd*, 19 Nev. 43, the court in considering a similar question, says: "In order to observe the uniformity required by the Constitution, classification, if made, must be based upon reasonable and actual differences; the legislation must be appropriate to the classification, and em-

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brace all within the class." See, also, *Turner v. Fish*, 19 Nev. 295; *State, ex rel., v. Hermann*, 75 Mo. 340; *Commonwealth ex rel., v. Patton*, 88 Pa. St. 258. In the case last cited the court asserts that there can be no proper classification of cities or counties except by population. *State, ex rel., v. Ellet*, 47 Ohio St. 90.

So far as classification has heretofore been resorted to in the legislation of this State, it has been strictly within the limits recognized as legitimate in the cases above cited, and it has met with judicial approval. It is not difficult to understand how increase of population in a county leads to increase in the duties imposed upon its officers, adds to their responsibilities and labor, and demands a higher grade of talent to meet the added duties. Hence, good and sufficient reasons for grading salaries of officers in accordance with population. So, also, it is easy to trace a definite connection between increasing urban population and increase of crime. We are authorized to take judicial notice of the fact that as the population of the city increases, whether the ratio of increase in the criminal element exceeds that of the non-criminal or not, the confederation of criminals thus brought about makes them relatively more powerful and dangerous, and more difficult of control. Hence the need of increased police protection, and the especial need of placing the control of the police force beyond the danger of intimidation, corruption, or control by that element.

But what possible connection can exist between school children or those of "school age" and crime? Except so far as an increase in the number of school children may serve to indicate in some degree an increase of population, can it be said that such increase affords any index to the growth of the criminal class? Manifestly not. As an indication of the growth of population, even, it is illusory, for the reason that it does not necessarily indicate the number of resident school children. They are not enumerated according to residence. Parents residing in one school corporation

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may, on request, be transferred for school purposes to another and enumerated there, regardless of their residence. R. S. 1881, sections 4472-4475. This may, and frequently, does, result in giving to a given school corporation an enumeration greatly in excess of or greatly below the number actually resident therein. In the same way and for the same reason a classification on any such basis lacks the permanency of a classification based on the population as shown by the decennial census, as the enumeration is made each year. In my judgment a classification of cities according to the enumeration of school children therein for the purpose of determining the necessity of subjecting the police force of such cities to control by the State is arbitrary, illusive, and not warranted by the Constitution. Such a classification bears no more relation to the avowed object of the legislation, and no more serves to account for or justify it, than would a classification based on the number of churches in the city, or the number of iron pumps or street lamps. We have a law requiring a quadrennial enumeration of the surviving soldiers and sailors of the State, and placing the report on file with the Adjutant General; also, laws requiring the report and registry of marriages, births and deaths; also, laws requiring an annual enumeration and registry of the dogs of the State; and a classification based on any of these could be sustained with quite as good reason. The opinion, as I understand it, also holds that we may take judicial notice of the enumeration of school children and their number in the different localities of the State. If the court is right in this we must judicially know that the law, instead of applying to a class of cities throughout the State, distinguished by certain characteristics bearing relation to, or requiring such legislation, in fact applies to but one city in which, so far as we know, or so far as the legislative declaration informs us, nothing exists requiring, or even remotely suggesting any necessity for it. The decision in this

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case goes beyond that of *Gentile v. State, supra*, and effectually expunges section 23 from the Constitution.

With the concession of the power to make such an amendment to a general law, even the mythical court of "conscience," which *Gentile v. State, supra*, assumed existed, disappears.

Filed Dec. 17, 1891; petition for rehearing overruled Feb. 20, 1892.

DISSENTING OPINION.

OLDS, J.—In my judgment the opinion in the case of *Gentile v. State, supra*, enunciates an erroneous doctrine, in holding that it is for the Legislature alone to judge whether a law on any given subject not enumerated in section 22, article 4, of the Constitution can be made applicable to the whole State. It in effect annuls section 23 of article 4 of the Constitution, and permits the Legislature to enact local laws at will, notwithstanding the Constitution declares such laws can not be passed when a general law can be made applicable; and I am not willing to extend the doctrine or apply it, except possibly in a case coming clearly within the provisions of that opinion. I think the law under consideration in this case, if upheld, is an extension of the doctrine, and recognizes an unlimited right to pass local laws singling out any particular town, city, township or county of the State, and pass a law applicable to such town, city, township or county; and I think there are other valid objections to the validity of the law fully stated in the dissenting opinion of McBRIDE, J. I therefore dissent from the opinion of the majority of the court.

Filed Dec. 17, 1891.

No. 15,284.

STANLEY ET AL. v. HOLLIDAY.

QUIETING TITLE.—*Sufficiency of Complaint.—Averment of Title.*—In a suit to quiet title, an averment that the plaintiff "is the owner by complete equitable title, and entitled to the possession of the" real estate, is sufficient to render the complaint good on demurrer.

BILL OF EXCEPTIONS.—*Evidence.*—In order that the long-hand manuscript of the evidence, taken by the official reporter, may become part of the record it must be incorporated in a bill of exceptions.

PRACTICE.—*Objections to Evidence.*—Only such objections to evidence will be considered on appeal as were made when the evidence was offered in the court below.

SAME.—*Objections to Evidence Must be Specific.*—A general objection to the introduction of evidence is not sufficient to present any question on appeal. The objection must be specific.

From the Lake Circuit Court.

T. J. Wood and M. Wood, for appellants.

H. A. Gillett, for appellee.

OLDS, J.—The appellee brought this suit against the appellants to quiet the title to the real estate described in the complaint.

The first alleged error discussed is the ruling of the court in overruling appellants' demurrer to the second paragraph of the complaint.

It is suggested by appellee's counsel that no such question is presented, for the reason that the assignment of error, being the second assignment of error purporting to raise this question, was indorsed upon the record more than one year after the filing of the record and the first assignment indorsed thereon in this court.

The assignment of record appears to have been properly made, and there is nothing in the record to show that it was not made at the same time of the first, except it may be that they are separate and distinct assignments, each being signed by the counsel for the appellants.

130	464
144	434
130	464
151	657

130	464
170	504

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We do not consider this objection to the assignment not having been made in time, for the reason that we have examined the paragraph of complaint, and are of the opinion there is nothing in the alleged error.

The objection made to the paragraph is that it seeks to quiet an equitable title, and that it alleges the appellee "is the owner by complete equitable title, and entitled to the possession of the" real estate, describing it; and it is contended that, while it is sufficient in a complaint to allege that the plaintiff is the owner in fee simple, it is not sufficient to aver a complete equitable title; that such averment is a mere conclusion, and facts must be alleged showing the plaintiff to be the complete equitable owner, and entitled to possession, instead of averring the same to be the fact. It is conceded that in *Burt v. Bowles*, 69 Ind. 1, such averments were held to be sufficient in a complaint for ejectment, but the logic of this decision is questioned, and it is contended that the rule should not be extended to pleadings in actions to quiet title.

The averment in the paragraph rendered it good at least as against a demurrer. The decision in the case of *Burt v. Bowles*, *supra*, has been adhered to in subsequent decisions. *Schenck v. Kelley*, 88 Ind. 444.

In the latter case it was held that a complaint for the possession of real estate was good as against a demurrer, although it did not aver the nature and extent of the interest the plaintiff claimed therein. It was very properly suggested in the opinion that a motion to make more specific would present "a very different question."

There can be no good reason for applying one rule to complaints for possession of real estate and another to complaints to quiet title. In each case the plaintiff must aver title, and, if necessary to aver the facts constituting title in one case, the same rule should be applied in the other.

In the case of *Grisson v. Moore*, 106 Ind. 296. this court
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said that "In a suit to quiet title, it is only necessary that the plaintiff disclose, in his complaint, whether the title claimed is legal or equitable."

The remaining errors discussed arise on the ruling of the court in overruling the motion for a new trial, and the right to have them considered depends upon whether or not there is any bill of exceptions containing the evidence in the record. There was thirty days given to prepare and file a bill of exceptions.

There is nothing which on its face purports to be a bill of exceptions in the record. What is called a bill of exceptions would seem to be a long-hand transcript of the evidence made out and certified to by the official stenographer, and it does not purport to be incorporated in a bill of exceptions, as has been held necessary by numerous decisions of this court. *Dick v. Mullins*, 128 Ind. 365; *McCoy v. State, ex rel.*, 121 Ind. 160; *McCormick, et al., Co. v. Maas*, 121 Ind. 132.

The certificate of the clerk shows it to be the long-hand manuscript. Notwithstanding no question is properly presented, we have noticed some of the questions discussed by counsel.

There was objection made by counsel for appellants to the introduction of a title-bond executed by an Indian named Po-ka-kause to William G. and George W. Ewing for certain real estate. The objection made to the introduction of the bond at the time, if it can be said that any objection was made, was that it was acknowledged by the Indian by his mark; or, as we interpret the objection, was on account of the Indian having signed by a mark, and a general objection that the evidence was immaterial and incompetent. In the brief counsel discuss the question that the bond was incompetent to be introduced in evidence for the reason that no proof was made of the execution of the bond by the Indian. Such objection was waived by not being made at the time the evidence was offered, though, if it had been made then, it

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would probably have been admissible. It was an old document, recorded many years ago, and was found in possession of the proper custodian.

Parties can not make one objection at the trial when the evidence is offered, and avail themselves of others on appeal. If the objection discussed had been pointed out when the evidence was offered, the objection, if a vital one, might have been avoided.

Counsel next discuss the ruling of the court in the admission of a patent issued by the United States to Po-ka-kause and his heirs for the land in question.

At the time the patent was offered a general objection was made to its introduction, but no particular grounds or reasons why it was incompetent were pointed out or stated at the time. There was no sufficient objection made to its introduction to present any question. *McCullough v. Davis*, 108 Ind. 292.

Counsel in their brief discuss particular objections to the introduction of the evidence, but none were made when the patent was offered.

As the bill of exceptions is not in the record, and no question is presented, we will not pursue the questions discussed by counsel further.

There is no error in the record.

Judgment affirmed.

Filed March 9, 1892.

No. 16,348.

REINHOLD v. THE STATE.

CRIMINAL LAW.—Indictment.—Conspiracy.—Value of Goods.—An indictment for a conspiracy to commit a burglary is not defective for failing to state the kind or value of goods intended to be stolen.

SAME.—Conspiracy.—Acquaintanceship of Conspirators.—On a charge of conspiring to commit a burglary or other crime the acquaintance of the conspirators with each other may be shown.

130	467
135	158
135	249
130	467
144	245
144	295
147	10
130	467
148	243
150	392

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SAME.—*Defendant's Knowledge of Property in House to be Burglarized.*—On such a charge it may be shown that valuable property was kept in the house or place to be burglarized without first showing that the accused knew of it.

SAME.—*Evidence Showing Endeavor of Accused to Meet Fellow-Conspirators.*—Evidence tending to show, in connection with other evidence already given, that the accused was endeavoring to meet his fellow-conspirators, is admissible.

SAME.—*Answer Not in Record.*—An erroneous question to which no answer appears in the record is not such an error as will reverse the case.

SAME.—*Conspiracy, Remark of Judge that it Had Been Shown.*—*Curing Error.*—A remark of the judge, on the trial of a conspiracy to commit a crime, that in his opinion sufficient evidence had been introduced to show the conspiracy charged, and, upon the theory that a third person was one of the conspirators, his declarations in furtherance of the conspiracy and carrying out the unlawful design are admissible, is erroneous; but the court may cure the error in its general charge to the jury by stating to them to disregard the opinion of the court.

SAME.—*Casual Remark of Court.*—*Withdrawing.*—A casual remark made by the court in the presence of the jury may be withdrawn just as an erroneous instruction, and the error, if any, will be cured.

INSTRUCTIONS.—*Presumption as to Instructions Refused.*—*Instructions Not All in Record.*—If the record does not contain all the instructions given to the jury, it will be presumed that the instructions given, but omitted from the record, gave the substance of all proper instructions refused.

SAME.—*Evidence Not in Record.*—*Presumption.*—If the evidence is not in the record, every reasonable presumption will be indulged to uphold the instructions given.

CHANGE OF VENUE.—*Discretion of Court.*—*Abuse.*—On a charge of a conspiracy to commit a burglary, the ruling of the court upon the motion for a change of venue from the county is a matter very much within the discretion of the court, and its refusal to grant the change is not reversible error, unless it is shown that there was an abuse of discretion.

From the Marion Criminal Court.

J. M. Bailey and W. Irvin, for appellant.

A. G. Smith, Attorney General, J. W. Holtzman, Prosecuting Attorney, J. S. Duncan and C. W. Smith, for the State.

MILLER, J.—The appellant and Harry Horton were jointly indicted for conspiracy. They were charged with having conspired, confederated and agreed with each other to commit

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burglary, with the intent to steal, take, and carry away the personal property of Hilton U. Brown.

The indictment was not defective for failing to state the kind or value of the goods intended to be stolen. *Hunter v. State*, 29 Ind. 80; *Short v. State*, 63 Ind. 376; *Buntin v. State*, 68 Ind. 38.

The defendant filed his affidavit and motion for a change of venue from the county. In opposition to this, the State filed the affidavits of a number of citizens of the county, stating that there was no excitement or prejudice against him, and that in their opinion he could have a fair and impartial trial in Marion county. The court overruled the motion.

This is a matter very much within the discretion of the trial court. We see nothing in the showing made that indicates an abuse of that discretion. Section 1771, R. S. 1881; *Spittorff v. State*, 108 Ind. 171; *Merrick v. State*, 63 Ind. 327; *Fahnestock v. State*, 23 Ind. 231.

Objection is made to the ruling of the court in permitting Philip Winklihouse, a witness for the State, to testify that on one occasion he went to the appellant's office with and at the request of Harry Horton.

The evidence is not in the record, and we are not informed what occurred at the appellant's office on the occasion referred to. Standing alone, the evidence shows little more than an acquaintance between the accused and Horton. This was admissible. The fact that the parties charged with a conspiracy are acquainted with each other is a circumstance, slight it may be, that the jury may consider with facts proven. A conspiracy to commit crime is not likely to exist between strangers. If the fact of the acquaintance of the accused with Horton was an immaterial one, and had no bearing upon the question in issue, the appellant was not injured by the evidence.

Hilton U. Brown, the owner or occupant of the dwelling-house, the burglary of which was charged to have been the

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object of the conspiracy, testified that he carried a gold watch. The defendant moved the court to withdraw this testimony from the jury, but his motion was overruled.

The record informs us that the State proposed to show in this connection that the watch was there, and could have been taken.

The court suggested that the evidence would not hurt either of the parties very much.

We are of the opinion that the remark of the court was pertinent. The evidence, if in the record, might show that this testimony was important to the prosecution or injurious to the accused. In the absence of the evidence it appears to be simply harmless.

The court did not err in permitting the State to prove by Frank Thorn that, prior to the conspiracy charged, the accused, speaking of Horton, made a statement, which, taken in connection with the explanation and evidence offered by the State, tended to show that the accused was seeking an opportunity to meet Horton in order to make an arrangement with him to commit burglaries.

The objection urged to the evidence is that it does not show that the proposed arrangement was to commit the specific burglary which was the object of the conspiracy charged.

This evidence was admissible as tending to show a willingness on the part of the accused to enter into a conspiracy with Horton for the commission of the crime of burglary. *Williams v. State*, 47 Ind. 568; *Walton v. State*, 88 Ind. 9.

Complaint is made of the ruling of the court in refusing to sustain the defendant's motion to strike out this question propounded to Otto Smith:

"What conversation, if any, did you have with Horton after that was done about going any where with him that night to do another job?"

This question could not have injured the accused; if he suffered injury it must have been because of the answer to

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the question. If the question was answered, it is wholly omitted from the bill of exceptions, and we are therefore unable to determine its nature or effect.

The next reason urged for a new trial relates to language used by the court, in the presence of the jury, in ruling upon the objection to the foregoing question, and is as follows:

“In the opinion of the court sufficient evidence has been introduced to show that a conspiracy existed between Reinhold and Horton to do the offence charged in the indictment, and, upon the theory that Horton is one of the conspirators, his declarations in furtherance of the conspiracy and carrying out the unlawful and felonious design in the indictment, it is admissible.”

In making this statement in the presence of the jury we are of the opinion that the court, unguardedly, used language in excess of that which was proper, and which was well calculated to influence the minds of the jury to the prejudice of the accused. The ultimate fact, upon which the jury was to pass, was the guilt or innocence of the accused of having conspired with Horton to do the offence charged in the indictment. The court in this statement says, without qualification, that in his opinion sufficient evidence had been introduced to show that such a conspiracy existed.

It was proper for the court to say, if such was the fact, that a *prima facie* showing of the existence of the conspiracy had been made; or that in his opinion such a showing had been made as to permit the declarations of Horton to be given in evidence. Gillett Crim. Law., section 310. What the court did say went far beyond this, and, standing alone, would be reversible error.

It is, ordinarily, not necessary for the court to instruct the jury to disregard the reasons given by the court, in their hearing, in the deciding of a question which belongs exclusively to the court. *Grubb v. State*, 117 Ind. 277.

We are satisfied that whatever error the court may have

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committed in expressing an opinion in the presence of the jury, was fully cured by its fourth instruction, in which, in addition to explaining the circumstances under which the remark was made, and stating that it was not the intention of the court to express an opinion for or against the accused, the court expressly withdraws such remark from their consideration, and directs them to give it no further consideration.

We are satisfied that a casual remark, made by the court, in the presence of the jury, may be withdrawn, just as an erroneous instruction, and the error, if any, will be cured. *Kingen v. State*, 45 Ind. 518; *Binns v. State*, 66 Ind. 428; *La Matt v. State, ex rel.*, 128 Ind. 123.

Much of the argument, in the brief of counsel, is devoted to a discussion of certain instructions given by the court to the jury, and to the refusal to give others, asked by the accused.

A preliminary question raised by the State must first be passed upon. We are met with the uncontradicted statement of counsel for the State that all the instructions given to the jury are not in the bill of exceptions.

If the record does not bring before us all the instructions given to the jury, we must presume, in favor of the action of the trial court, that the instructions given, but omitted from the record on appeal, gave the substance of all proper instructions refused, and that, therefore, the party complaining was not injured by such refusal. *Delhaney v. State*, 115 Ind. 499; *Lehman v. Hawks*, 121 Ind. 541; *Ford v. Ford*, 110 Ind. 89.

In *Gallaher v. State*, 101 Ind. 411, this court said: "We are bound to presume that the other instructions given by the trial court did express the law correctly, and the imperfections and obscurities in those brought into the record were removed by the other instructions given by the court. * * * There may, perhaps, be cases where this court could decide that there was error in giving instructions without having all the instructions before it, but the case

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that would warrant such a course must be an extraordinarily strong one."

See, also, *Marshall v. Lewark*, 117 Ind. 377; *City of Indianapolis v. Murphy*, 91 Ind. 382; *Stull v. Howard*, 26 Ind. 456.

"It may be too radical a presumption to indulge, that the alleged erroneous instruction was withdrawn." Gillett Crim. Law, section 919. But all reasonable presumptions short of that will be entertained in favor of the ruling of the lower court.

The bill of exceptions does not state that the instructions set out in the bill were all the instructions given. The numbers of those contained in the bill are not consecutive, and we find no affirmative evidence to show that other instructions were not given, and nothing from which such inference can be indulged. *City of New Albany v. McCulloch*, 127 Ind. 500; *Grubb v. State*, *supra*.

Strong presumptions in favor of the correctness of the rulings of the trial court are indulged in, and if the instructions would be proper under any evidence that might have been given under the issues, the presumption will, in the absence of the evidence, be entertained that such evidence was introduced. *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Joseph v. Mather*, 110 Ind. 114; *Stevens v. Stevens*, 127 Ind. 560; *Hilker v. Kelley*, *ante*, p. 356.

In the absence of the evidence and of an affirmative showing that all the instructions given by the court are in the record, we can not reverse the judgment of conviction rendered against the appellant, even if the instructions were subject to the infirmities urged by counsel. Under these circumstances we do not feel called upon to set out or discuss the instructions given or those asked.

It would not have been difficult to have included all the instructions given in the bill of exceptions, and to have complied with Rule 30 of this court by incorporating therein a statement of the judge that there was competent

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evidence introduced on the trial material to the point covered by the instructions, when the questions so ably discussed would have been before us without putting the evidence in the record.

It is proper to say that the record does not seem to have been prepared by the counsel who represent the appellant in this court.

Judgment affirmed.

Filed Feb. 19, 1892.

No. 15,450.

PATTISON v. BABCOCK ET AL.

PRACTICE.—*Demurrer to Paragraph of Answer.*—*Erroneously Sustaining.*—*Another Paragraph on File.*—Sustaining a demurrer to a paragraph of answer when another paragraph is on file which is applicable to the same state of facts plead in the one to which the demurrer is sustained is a harmless error.

MARRIED WOMAN.—*Principal or Surety.*—*Ratification.*—If a husband procure a conveyance of land to be made to his wife, instead of to himself, without her knowledge, and she execute with him a note and mortgage to secure the payment of the purchase-money, the vendor supposing she is the purchaser, and afterwards she is informed of the fact that the conveyance was made to her, and she does not object to the transaction until suit is brought to foreclose such mortgage, her action will amount to a ratification of the transaction, and she is bound thereby.

From the Starke Circuit Court.

N. L. Agnew and B. Borders, for appellant.

W. O. Johnson and J. S. Slick, for appellees.

McBRIDE, J.—The appellee owned certain real estate in Pulaski county which he conveyed to the appellant.

She, with her husband, executed to him notes for the purchase-money, and also executed to him a mortgage on the

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property as security for the notes. This was a suit on the notes and to foreclose the mortgage.

The appellant answered in four paragraphs.

The first was the general denial.

The second and third were pleas of suretyship, alleging, in substance, that when the notes and mortgages were executed she was a married woman, that the debt represented by the notes was her husband's debt, and that she executed them as his surety only.

The fourth paragraph alleged, simply, that she received no consideration for the notes, and was, when she executed them, a married woman.

To this paragraph the court sustained a demurrer.

The first assignment of error challenges the correctness of this ruling. The answer in question is not good as a plea of want of consideration, and, if sustained at all, it could only be as being in effect a plea of suretyship. It is unnecessary for us to consider whether its averments are sufficient, viewing it as a plea of that character, for the reason that the appellant already had the full benefit of that defence under two other answers.

Even assuming this answer to be good, therefore, there could be no available error in the ruling.

The remaining questions in the record may all be properly and profitably considered together.

The court made a special finding of the facts, which, in so far as it is material to any question arising on this appeal, is substantially as follows:

On and before August 1st, 1883, the appellee, who was a resident of Fulton county, was the owner in fee of the mortgaged land, consisting of forty acres, situated in Pulaski county, which was subject to the lien of the taxes for the year 1883, and a ditch assessment of \$85.50. The appellant, who was then the wife of one George H. Van Gorder, resided with her husband in Fulton county. Some two years later Van

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Gorder deserted her, and she was subsequently divorced from him, and intermarried with the appellee Harris E. Pattison.

The appellee, desiring to sell the land, called upon Van Gorder a few days before August 1st, 1883, and offered to sell it to him for \$400, in payments, the liens on the land to be assumed as a down or cash payment. Van Gorder informed him that he thought his wife would take it, and requested him to wait a few minutes until he could confer with her. Van Gorder went away, but soon returned, and informed the appellee that his wife would take the land. It was then arranged between the appellee and Van Gorder that the appellee should return to his home in Fulton county, and, with his wife, execute a deed for the land to the appellant subject to said liens, and should cause to be prepared notes and a mortgage covering the deferred payments of purchase-money, and should send them to the bank at Winamac, Indiana, with instructions to the bank to deliver the deed, on the execution by Van Gorder and the appellant of the notes and mortgage.

The court finds that during the negotiations the appellant and appellee never met; that there was no communication between them; and that the appellant had never, prior to that time, authorized Van Gorder to act for her. The appellee having, with his wife, signed, sealed and acknowledged the deed, sent it, with the notes and mortgage, to the bank at Winamac. Van Gorder called at the bank and got the notes and mortgage, and he, with the appellant, signed them, and acknowledged the mortgage before a notary public. The appellant's signature was the first placed to both notes and mortgage. Van Gorder then delivered the notes and mortgage to the bank, and received the deed, which he caused to be recorded. The notes and mortgage were transmitted to the appellee. The deed was not placed in the hands of the appellant, and she never occupied or did any thing with the land.

The mortgage was in the ordinary form, with general war-

ranty. The taxes and ditch assessment were not paid, the land was sold to pay them, a deed was made to the purchaser, who thereafter foreclosed his lien, and in time became the owner of the property under foreclosure sale. The court finds that when the appellant executed the notes and mortgage she had no actual knowledge that the deed had been made to her, but that, within four weeks thereafter, and before the property was sold for taxes, her husband informed her that it was so made, and that he had caused it to be done to defraud his creditors. The court also finds, in this connection, that the appellee had no knowledge of the foregoing facts, and that the appellant at no time before the commencement of this action communicated to or in any way notified or informed him that she had not accepted the deed, but remained silent, and that he had no knowledge of her claim that she had not accepted the deed, until her answer was filed in this case, and that the appellant and the appellee never saw or communicated with each other until two years after the mortgage was executed.

The court finds that throughout the entire transaction the appellee acted in the utmost good faith, and always believed that every step in the transaction was with the full knowledge and consent of the appellee, and that he took and held the notes relying upon her personal credit and her ability to pay them.

The appellant assails the findings vigorously, insisting that they are not sustained by the evidence—especially the findings relative to the good faith of the appellee, and that reciting that Van Gorder informed appellee that his wife would take the land.

Special findings, like the verdict of a jury, will not be set aside in this court if there is any evidence tending to sustain them.

We have, however, looked into the evidence, and find no inconsistency between it and the findings sufficient to affect the result.

Pattison v. Babcock et al.

The only controversy in the case is over the personal judgment which the court rendered against the appellant. It is conceded that the appellee was entitled to a decree, foreclosing the mortgage. The appellant contends that upon the facts found the appellant is to be treated as a mere surety for her husband, and that, although not entitled to avail herself of the defence as against the mortgage, there can be no personal judgment against her.

In our opinion there is nothing of suretyship, directly or indirectly, involved in the transaction.

It is undisputed that the appellant obtained title to the land which formed the sole consideration for the notes. She knew of this fact within four weeks after the transaction, and with full knowledge retained it, and made neither effort nor offer to rescind or reconvey. She had the power to buy in the first instance and to execute her notes for the purchase-money. She had equally the power to ratify the purchase after it was made, even if it was originally made without authority. Retaining the title to the land for years, with full knowledge of the facts, and with no offer to rescind or reconvey, would be a complete ratification.

We find no error in the record.

Judgment affirmed.

The appellant having died since the submission of the cause, it is ordered that the judgment of affirmance be entered as of the date of the submission.

Filed Feb. 20, 1892.

Shanks v. Robinson.

No. 15,370.

SHANKS v. ROBINSON.

MALICIOUS PROSECUTION.—*Malice.*—*Evidence.*—*Ill-Will Against Third Persons.*—In an action for malicious prosecution it is competent to prove the ill-will or malice of the defendant against the plaintiff, but it is not competent to prove that the defendant entertained malice against third persons.

SAME.—Where it becomes necessary to show the intent, it is competent to prove the transactions between the immediate parties, and the nature of the controversy between them.

From the Ohio Circuit Court.

H. D. McMullen, W. R. Johnston, M. J. Givan and N. S. Givan, for appellant.

J. K. Thompson, G. M. Roberts and C. W. Stapp, for appellee.

ELLIOTT, C. J.—The appellant charges in her complaint that the appellee maliciously caused a prosecution to be instituted against her for a violation of a statute making it an offence to "carry a weapon with intent to injure a fellow-man." She was defeated. The questions argued arise on the motion denying a new trial.

We have examined the principal questions made by counsel upon rulings made in admitting and excluding evidence, although the counsel have not referred to the parts of the transcript, as the rules of practice require. If objection had been made by the appellee we should not have felt at liberty to consider the questions, but, as no objection has been made, we have given them consideration.

There was no error in excluding evidence of the ill-will or malice of the appellee against persons other than the plaintiff in the action. It is competent in actions for malicious prosecution to prove the state of feeling existing between the parties to the action, but it is not competent to prove that the defendant in such an action entertains malice against third persons.

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Where it becomes necessary to show the intent, it is competent to prove the transactions between the immediate parties, and the nature of the controversy between them. In this instance the intention of the appellant was a material element, inasmuch as proof of her hostile feelings toward the defendant tended to make it appear that there was probable cause for the prosecution instituted against her. *Peden v. Mail*, 118 Ind. 560.

We have examined the instructions, although they have not been referred to as the rules of the court require (*vide* Rule 26). The instructions are somewhat confused, and some expressions contained in them are probably erroneous; but, construing those expressions in connection with other parts of the instructions, as we must, it can not be said that they misled the jury.

Judgment affirmed.

Filed Feb. 27, 1892.

130	480
133	228
130	480
145	603

 No. 15,446.

SICKMAN v. WILHELM ET AL.

FRAUDULENT CONVEYANCE.—*Setting Aside.*—*Special Finding.*—*Fraudulent Intent.*—In an action to set aside a conveyance as fraudulent, where there is a special finding, a fraudulent intent must be found as a fact, otherwise the conveyance can not be held to be fraudulent as to creditors.

From the Starke Circuit Court.

H. R. Robbins, for appellant.

G. W. Beeman, for appellees.

MILLER, J.—This action was brought by the appellant against the appellees to set aside a conveyance of real estate, executed by Jefferson Wilhelm to his co-appellees, and to

subject the land to the payment of a judgment held by the appellant against Jefferson Wilhelm.

The complaint makes the usual charges of fraud in the execution of the deed, and that it was without consideration.

The defendants answered the complaint by a general denial.

At the request of the plaintiff the court made a special finding of facts and conclusions of law.

The conclusions of law were favorable to the defendants, and final judgment was rendered in their favor, in which the court refused to set aside the conveyance as fraudulent.

The appellant excepted to the conclusions of law, and also moved the court to so modify the judgment as to declare a lien against the land for the amount of the plaintiffs' judgment, subject to the sum of \$400, which was to be a first lien in favor of the grantees.

Without setting out or stating the substance of the findings of fact, or discussing other questions of law presented by the record, it is sufficient to say that the court did not err in its conclusions of law, or in overruling the motion to modify the judgment.

The court, in its finding of facts, did not find as a fact that the conveyance was executed with a fraudulent intent.

In the case of *Citizens' Bank v. Bolen*, 121 Ind. 301, this court said: "The question of fraudulent intent is a question of fact, and not of law, under our statute; and in an action in the form of a creditor's bill to set aside a conveyance as fraudulent, where there is a special finding, a fraudulent intent must be found as a fact, otherwise the conveyance can not be held to be fraudulent as to creditors."

Again, in *Farmers' Loan and Trust Co. v. Canada, etc., R. W. Co.*, 127 Ind. 250 (269), it is said: "It is settled by our decisions that fraud must be found and stated as an inferential or ultimate fact, and that it is not sufficient to state

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badges of fraud, or the evidences of fraud, in a special finding."

These cases are sustained by a large number of cases, among which we cite: *Cicero Tp. v. Picken*, 122 Ind. 260; *Kirkpatrick v. Reeves*, 121 Ind. 280; *Wilson v. Campbell*, 119 Ind. 286; *Phelps v. Smith*, 116 Ind. 387; *Bartholomew v. Pierson*, 112 Ind. 430; *Stix v. Sadler*, 109 Ind. 254; *Elston v. Castor*, 101 Ind. 426; *Rose v. Collier*, 76 Ind. 590; *Fletcher v. Martin*, 126 Ind. 55.

In the absence of a finding of this fact, the court could neither set aside the conveyance nor declare a lien against the land.

Judgment affirmed.

Filed Jan. 30, 1892; petition for a rehearing overruled March 10, 1892.

No. 15,607.

TAYLOR v. BRUNER, TRUSTEE.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Rights of Assignee to Possession.*

—Under sections 2662 *et seq.*, R. S. 1881, the assignee may recover, as against the assignor, the actual possession of the real estate embraced in the deed of assignment, for the purpose of letting the same to tenants.

SAME.—*Inchoate Interest of Assignor's Wife.*—Where the wife of an assignor for the benefit of creditors does not join in the deed of assignment, her inchoate interest in the land conveyed does not become perfect until a sale by the assignee, who is entitled to actual possession until such sale.

From the Wabash Circuit Court.

A. Taylor, for appellant.

W. G. Sayre and O. Bogue, for appellee.

COFFEY, J.—The sole question presented by the record in this case, for our decision, relates to the right of the assignee,

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under the provisions of section 2662, R. S. 1881, and following sections, to recover, as against the assignor, the actual possession of the real estate embraced in the deed of assignment, for the purpose of letting the same to tenants.

The rule as to personal property is, that the assignee, immediately after the deed is recorded which vests the title in him, shall take actual possession and control.

Following the familiar rule, however, that the possession of the vendor is the possession of the vendee, it is held that the deed vests the assignee with the possession of the real estate therein described whenever such things are done as vest the title in him. Burrill Assign., p. 406. In this respect a deed assigning real estate for the benefit of creditors does not differ from any other deed of conveyance.

"A general assignment of all the debtor's property will pass to the assignee everything which is by its nature assignable, except property specially exempted by law, or excepted by the terms of the deed or the schedules annexed, where the law allows an exception." Am. & Eng. Encyc. of Law—title "Assignments for Benefit of Creditors."

A deed of conveyance to land in the possession of the grantor not only carries with it constructive possession in the grantee, but, in the absence of any reservation or controlling statute, it carries, also, the right to actual possession. There is nothing in our statute upon the subject of voluntary assignments controlling the legal effect of the deed of assignment. Indeed, the inference to be drawn from its provisions is that it is the duty of the assignee to take the actual possession of all the assignor's property, except that portion exempt by law, and reduce the same to cash, as speedily as the interest of the estate will permit, for the benefit of the creditors. It is true, where the assignor has a wife, she has an inchoate interest in the land conveyed, unless she joins in the deed; but such interest does not become perfect until sale made by the assignee, and until such sale the assignee is, in our opinion, entitled to the actual posses-

Taylor, Guardian, v. Birely, Administrator.

sion of the real estate conveyed to him by the deed of assignment.

It follows that there is no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed March 10, 1892.

No. 15,026.

TAYLOR, GUARDIAN, v. BIRELY, ADMINISTRATOR.

PRACTICE.—*Trial Court.*—*Presumptions in Favor of Proceedings of.*—On appeal the presumption is in favor of the proceedings of the trial court, and a party who assails them must affirmatively show prejudicial error.

From the Wabash Circuit Court.

A. Taylor, for appellant.

O. H. Bogue, for appellee.

ELLIOTT, C. J.—The appellant was the guardian of an infant ward, and as such made a report to the court, to which exceptions were addressed. The exceptions were sustained.

The appellant's first point is that the court erroneously refused to allow him any compensation for his services as guardian. We can not say from the record that there was any error, nor does the appellant in his brief show that there was error. Some general statements are made, but there is no specification that enables us to find any reason supporting the general assertion. The presumption is in favor of the proceedings of the trial court, and a party who assails them must affirmatively show prejudicial error.

The appellant complains that the court refused to allow him interest on money expended for his ward in excess of amount received. If it were conceded that the evidence

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shows that the guardian did advance money for his ward, it would not necessarily follow that he is entitled to charge interest, but in this case the evidence can not be regarded as so clearly showing an advancement as to justify us in disregarding the finding of the court.

We can not say upon the evidence in the record that there was error in refusing to allow the claims represented by vouchers which the court refused to approve.

Judgment affirmed.

Filed March 15, 1892.

No. 15,329.

ALEXANDER ET AL. v. GILL.

PRACTICE.—Appeal.—Notice to Co-parties.—When Not Necessary.—When all the defendants against whom a judgment has been rendered appeal, it is not necessary to serve notice on other defendants to the record, against whom no judgment has been rendered, and who have no interest in the appeal.

SAME.—Joint Demurrer.—In such an instance the appellants may assign as error a joint demurrer filed by all the defendants with the same effect as if all the defendants were appellants.

OFFICER.—Liability of Judicial Officer for Wrongful Decision.—A judicial officer, acting in the exercise of judicial functions, is not liable to a party injured, however erroneous his decision may have been.

JUSTICE OF THE PEACE.—Judgment.—Collateral Attack.—Title to Land Put in Issue by Affidavit.—Protection to Officer Enforcing Judgment by Process.—The decision of a justice of the peace, when it is sought to put the title of land in issue by affidavit, that the title is not in issue and that he has jurisdiction to hear and try the cause, is not subject to collateral attack, and a judgment rendered therein by him is a complete protection to the officer enforcing process issued on such judgment.

From the Marshall Circuit Court.

A. C. Capron, M. A. O. Packard and C. F. Drummond,
for appellants.

J. D. McLaren and E. C. Martindale, for appellee.

130	485
130	517
130	485
131	420
132	104
132	250
130	485
142	343
130	485
147	692
130	485
153	578
180	485
154	284
154	378

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OLDS, J.—Newton Jackson and Jacob Ewald in August, 1887, filed their complaint before William C. Alexander, a justice of the peace of German township, in Marshall county, against Abraham Gill, for the possession of certain real estate described in the complaint, alleging that the plaintiffs in said cause were the owners and the defendant Gill was the tenant of the plaintiffs, and was unlawfully holding over and keeping such plaintiffs out of possession.

No question is urged as to the sufficiency of the complaint, and it was in the usual form of a complaint by a landlord against his tenant who was unlawfully holding over after notice to quit.

In that action the appellee herein appeared, and filed a verified answer, alleging that he was in possession of the real estate lawfully and of right, as owner thereof; that he purchased the real estate of Jackson, one of the plaintiffs in the action, and was put in possession under his contract of purchase before Jackson sold and conveyed the real estate to his co-plaintiff Ewald, and Ewald had full knowledge of his contract of purchase, and that he held possession at the time said Ewald purchased of Jackson.

To this answer the plaintiffs demurred, and the justice sustained the demurrer, and proceeded to the trial of the case, rendering judgment in favor of the plaintiffs for the possession of the land, and for damages for the detention. No appeal was taken from said judgment. Afterward the justice issued an execution and writ of restitution on said judgment, and delivered the same to David C. Smith, a duly-qualified and acting constable of said township. The said constable proceeded to execute the writ. The said appellee, Gill, and his wife and family refused to leave the premises or allow the constable to remove his goods, consisting mainly of household goods, and the plaintiff and his family made an assault on the constable. The constable, being unable to execute the writ, then called to his assistance Jacob Ewald, Carlson Ewald, Edward Ewald, Levy Cox and Frederick Rowe, all of

Alexander et al. v. Gill.

whom were citizens of said Marshall county, and commanded them to help him remove the said appellee and his family and goods from said premises, which they proceeded to do, using no more force than necessary to remove them.

The appellee then brought this action against William C. Alexander, the justice of the peace, David C. Smith, constable, Jacob Ewald, Carlson E. Ewald, Edward C. Ewald, Frederick Rowe and Levy Cox for damages for removing him by force from the premises aforesaid of which he was in possession.

The defendants below answered, first, by general denial, and, secondly, pleaded the judgment and writ of restitution issued upon the same, the resistance offered the constable in the execution of the writ, and his inability to execute the same without assistance, and that he called his co-defendants, except Alexander, the justice, to aid him, and they used no more force than was necessary to remove the plaintiff and his family and goods from the premises.

To this answer the appellee replied the filing of the answer by this appellee in the action before the justice of the peace, alleging his ownership of the land, which was verified.

The defendants demurred to this reply for want of facts, which demurrer was overruled, and this ruling is assigned as error, and this presents the only question in the case.

There is a bill of exceptions set out in the record, but it was not presented to the judge in time, and is not properly in the record.

There was a trial of the cause, resulting in a judgment in favor of the appellee against all of the appellants, being all of the defendants below except Frederick Rowe.

The appellants appeal, but serve no notice of appeal on Rowe; and it is contended by the appellee that the cause should be dismissed on account of the fact that Rowe does not join in the appeal, and no notice of the appeal has been served on him by the appellants, as required by section 635,

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R. S. 1881, or that error is not properly assigned by the appellants alone.

There is nothing in this objection. It has been held by this court that, when all of the parties against whom a judgment has been rendered appeal, it is not necessary to serve notice upon other parties to the record, against whom no judgment has been rendered, and who have no interest in the appeal. *Koons v. Mellett*, 121 Ind. 585. There was no judgment rendered against Rowe, and he has no interest in this appeal.

The defendants filed a joint demurrer, and it was overruled. If such ruling was erroneous, it is available for all of the appellants, and is properly assignable as error by them on appeal. They can not be deprived of taking advantage of an erroneous ruling against them for the reason that no judgment was rendered against one of the defendants who joined in the demurrer.

We now come to the real question in the case regarding the sufficiency of the reply. It is contended on the part of the appellee that the filing of the verified answer by the appellee in the action before the justice of the peace, alleging himself to be the owner of the land, terminated the jurisdiction of the justice, and all that the justice had authority to do thereafter was to certify the cause to the circuit court; that the judgment rendered by said justice was absolutely void, and the writ issued thereon gave no authority to the constable to put the appellee, Gill, out of the possession and restore the same to Ewald; and that the writ was no authority or protection to the constable or the other appellants for the acts done by them in putting appellee out of the possession of the land, and that the justice is also liable.

It is not contended by counsel but that the justice of the peace had jurisdiction, both of the subject-matter of the controversy and of the parties, up to the time when the defendant in the cause filed his verified answer. When this answer was filed, it became the duty of the justice to pass

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upon the question of its sufficiency, and whether or not it did in fact put in issue the title to real estate. The justice had jurisdiction to decide, and having such jurisdiction it involved the right to decide either that it did or did not put in issue the title to the real estate. The ruling that it did not was equally as binding upon the parties as a contrary ruling would have been. It is held that a judicial officer, acting in the exercise of judicial functions, is not to be held liable to a party injured, however erroneous his decision may have been, and the rulings, however erroneous, are binding upon the parties to the action until reversed or set aside. This is true of courts of limited as well as general jurisdiction. The justice of the peace had jurisdiction to decide upon the sufficiency of the answer, and having done so, and held it insufficient, and proceeded to the trial of the case, and rendered judgment, the judgment was binding upon the parties, and could not be questioned collaterally; and the writ issued upon the judgment was full protection to the officer and those whom he called to his aid in the execution of the writ. A case involving a question very similar to this is *State, ex rel., v. Wolever*, 127 Ind. 306, where it was contended that a valid affidavit for a change of venue terminated the jurisdiction of a mayor of a city, and rendered all subsequent proceedings had before him *coram non judice* and void. In that case the question of the liability of the officer making the decision and rendering the judgment is very fully discussed, and it is held that he was not liable. Under the authority of that opinion, the appellant William C. Alexander, the justice of the peace, is not liable. It is said: "If he decides the motion wrong, and is protected therein, it will not do to say that the immunity ends with the decision of that single question, but it extends to such additional rulings and such additional action as necessarily or legitimately might follow if the decision was correct." If the officer, the justice, or the judge who makes the decision is protected from liability and damages resulting from

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his erroneous decision, we are unable to see any good reason why the officer, the constable, who executes the writ that the justice is protected in issuing, should not also be protected from liability on account of his acts in the execution of the writ, and likewise those citizens whom he may call to his aid in the execution of the writ.

If it is true, as contended by counsel for appellee, that section 1434, R. S. 1881, is applicable to actions such as the one presented against the appellee before the justice of the peace, and that when the title to real estate is put in issue, the justice has no authority other than to certify the cause, and, in case a proper affidavit for a change of venue is filed, to grant the change, yet the justice must adjudicate and pass upon the sufficiency of the affidavit for change of venue, and determine whether or not the title to real estate is put in issue, which, in many instances, might be very difficult; but having the right, and it being his duty to pass upon the question, his decision is binding until set aside or reversed, and can not be attacked collaterally. The decision and further proceedings may be erroneous and ineffectual, and may be set aside if appealed from, but they are not void in the sense that they can be ignored, as was done in this case. We have numerous decisions of this court holding directly in accordance with the theory we have enunciated, in cases where courts of inferior jurisdiction are required to and do pass upon the facts giving them jurisdiction, and holding that where courts are required to pass upon the facts giving them jurisdiction, and they assume jurisdiction, and take further action in the matter, such decision is conclusive, and the proceedings and judgment can not be attacked collaterally, notwithstanding the assumption of jurisdiction was erroneous, and might be set aside or reversed on appeal. The judgment, though erroneous, while it remains, is as binding and conclusive as though it was right, and based upon facts giving the court rightful jurisdiction. See *Chicago, etc., R. W. Co. v. Sutton*, *ante*, p. 405, and authorities there cited.

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This principle is decisive of the question in the case at bar, for, if the facts giving the court rightful jurisdiction did not exist, the decision was wrong, and the court would have no rightful jurisdiction to proceed further; but it is conclusively settled in this State that the decision of the court in assuming jurisdiction can not be questioned in a collateral attack, and is conclusive until set aside or reversed on appeal.

In the case at bar the appellee filed an answer in the cause pending before the justice, which, it is contended, put in issue the title to real estate, and ousted the jurisdiction of the justice. But whether the answer was sufficient or not was a question for the justice to pass upon before certifying the case to the circuit court, or taking further proceedings in the case. The court did pass upon the question, and held that the answer was not sufficient, and sustained a demurrer to it, and his decision is conclusive, and so were the further proceedings following thereafter, including the final judgment, and it can not be attacked collaterally or ignored as utterly void.

We have a class of cases, particularly when the question has come up on appeal, as to the validity of the proceedings and judgment rendered after steps have been taken which rightfully terminated the jurisdiction of the justice, in which it is said that the proceedings had and judgment rendered after such stage of the proceedings were void; but to use the word "void" in its true sense would be to put those cases in direct conflict with the other line of later authorities which we have referred to, and cited. Many of these cases are collected and cited in the case of *State, ex rel., v. Wolever, supra*, where the word "void" is again used. The word "void" in these cases must be held to mean "voidable." The court having no rightful jurisdiction after the steps were taken which would have terminated the jurisdiction if the court had made a correct ruling, but the court having the right to decide, its decision, whether right or wrong, was

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binding until reversed, and the judgment rendered in the cause can not be treated as absolutely void, nor is it subject to a collateral attack.

In our opinion stronger reasons exist for holding that a court can not gain jurisdiction by an erroneous ruling than for holding that its jurisdiction once lawfully acquired is terminated by an erroneous ruling; and, certainly, if its judgment in the former case is not void or subject to collateral attack, it is not in the latter.

It follows, therefore, from the conclusion we have reached, that the court erred in overruling the demurrer to the reply.

Judgment reversed, with instructions to the circuit court to set aside the judgment and sustain the demurrer to the reply.

Filed Feb. 27, 1892.

No. 14,991.

KITTS ET AL. v. WILLSON ET AL.

VERDICT.—*Special Findings Unauthorized.*—Unauthorized findings inserted in a special verdict must be disregarded.

MORTGAGE.—*When Deed may be a Mortgage.*—*Purchaser with Notice.*—An absolute conveyance, without any accompanying written defeasance, contract of repurchase, or other written agreement, may be shown by means of extrinsic and parol evidence to be in reality a mortgage, as between the parties to it and as against all those deriving title from or under the original grantee who are not *bona fide* purchasers for value and without notice.

SAME.—*How Construed in Absence of Evidence.*—*Prima facie* such an instrument is an absolute deed; and a court will so recognize and treat it in the absence of affirmative evidence changing its apparent character.

FRAUDULENT CONVEYANCE.—*Aiding Grantor to Recover.*—*Heir.*—*Wife.*—As between the parties a court of equity will never interfere at the instance of a fraudulent grantor, who executes a conveyance to cheat his creditors, to aid him in the recovery of his property; and the heirs of a fraudulent grantor can no more question the validity of the conveyance than he can himself, but his wife can, although she join in the deed, if she had no knowledge of the intended fraud.

130	492
130	309
130	492
131	556
130	492
140	805
130	492
160	240

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COSTS.—Quieting Title.—Disclaimer.—In order to recover his costs, a defendant in a suit to quiet title must file his disclaimer when he first appears; and if he does not then but afterwards file his disclaimer the plaintiff will be entitled to a judgment for all costs accrued up to the date of its filing.

From the Decatur Circuit Court.

E. P. Ferris, J. S. Ferris, W. A. Moore and W. W. Spencer, for appellants.

W. G. Holland, C. H. Wilson, F. E. Gavin and J. D. Miller, for appellees.

MCBRIDE, J.—This was a suit by the appellant Sarah Kitts for the partition of certain land in Ripley county, of which she claims to be owner of the undivided one-half, one-third of which she claims as the widow of one David H. Kitts, and one-sixth as heir of two of her deceased children. The complaint also seeks to have a warranty deed of the land, executed by her and her said husband, declared a mortgage and to have her title quieted.

There was a cross-complaint by the appellees William D. and Thomas E. Wilson, in which they claim to be the owners in fee simple of all of said land, and ask that their title be quieted.

The case has had a somewhat remarkable history. It has been six times tried, and is in this court for the fourth time. See *Cravens v. Kitts*, 64 Ind. 581; *Kitts v. Willson*, 89 Ind. 95; *Kitts v. Willson*, 106 Ind. 147. A special verdict returned by the jury last trying it is not the least remarkable of its features. It was apparently constructed by the jury according to their own ideas, regardless of form or precedent. It consists of thirty-two separately numbered propositions, each signed by the foreman, in which findings of fact, of evidence, and of mingled law and fact, are curiously mingled. Such as it is, however, all of the parties have elected to abide by it, and the only questions presented in this appeal grow out of the application of the law to the facts thus found. To copy the special verdict would unneo-

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essarily encumber the record with a mass of verbiage. It is difficult to fairly abstract, but, in so far as the facts found are material to the controversy, they are substantially as follows:

January 13th, 1864, David H. Kitts, husband of the appellant Sarah Kitts was the owner in fee simple of the land in controversy, and on that day they joined in conveying it to one James H. Cravens, by what on its face purported to be a warranty deed. The consideration named in the deed is \$1,200, less a school fund mortgage for \$139. Kitts at the time owed Cravens \$100, and was about entering the army. He was also a surety on the official bond of one Vandever, who was sheriff of Ripley county, and who, the jury find, had become a defaulter in a large sum for moneys collected by him as such sheriff, and not accounted for, and had absconded. The jury find that, at the time, Kitts applied to Cravens to know what he should do in the matter of his liability on Vandever's bond, and that Cravens suggested to him the conveyance of his land to some person in whom he had confidence; that Kitts suggested Cravens, and thereupon, with his wife, executed the deed. Of the deed to Cravens the jury make the following finding: "That said writing was executed and delivered to said Cravens for the fraudulent purpose of cheating, hindering and delaying the creditors of said Kitts in collection of their claims against him."

The jury make the following additional finding relative to the knowledge which the appellant had of the fraudulent character and purpose of the conveyance: "And that the plaintiff had no knowledge of the liabilities of David H. Kitts on the Vandever bond, only what was said by Cravens, that it was to get shut of paying a liability of \$3,000 growing out of Vandever's defalcation and a Holten execution."

The jury make a further finding relative to the conveyance as follows: "In consideration of which there was a parol agreement made between said Kitts and Cravens; that

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was, that Cravens was to pay off said mortgage, keep the taxes paid on the said Kitts land, and, further, when David H. Kitts came home out of the army, and paid to said Cravens said \$100 that Kitts owed said Cravens, and paid back the school fund mortgage, together with the taxes, then Cravens was to deed back said land to said David H. Kitts."

At the time of the conveyance there were on the land a log house, a frame stable, and some other improvements, and Kitts, with his family, resided on it. Kitts enlisted in January, 1864, and returned from the army July 4th, 1865. During his absence the land was occupied by the appellant and her children. It was then worth \$2,850.

After Kitts returned from the army he, with his family, continued to reside on the land until October 23d, 1868, during which time he farmed and improved the land to some extent. He also cut and sold 100 cords of wood from it, and cut and hauled saw-logs to a saw-mill sufficient to make 12,000 to 15,000 feet of lumber, a portion of which was for a house and barn on the land. He also sold other timber, for which he received the pay. The jury make findings of some length relative to the conveyance by Cravens to Kitts of some lands in Missouri and of Kitts' removal there with his family, and of his return in October, 1871.

We omit these because not material as the controversy is presented to us. After Kitts returned from Missouri in October, 1871, a tenant who was occupying the land under Cravens vacated the premises, and Kitts again entered into possession, and thereafter resided on the land until his death, which occurred October 14th, 1873. The jury find that, as between Cravens and Kitts, they regarded the conveyance of January 13th, 1864, as a mortgage.

November 6th, 1873, the appellant filed with the clerk of the Ripley Circuit Court her petition as widow of David H. Kitts, deceased, to have the property belonging to his estate set off to her, as not being worth over \$500. This resulted

in the filing of an inventory and appraisement amounting to \$482.90, all personal property. No real estate was inventoried or appraised. The appraisement was approved, and by order of court the title to the property was vested in the widow.

December 31st, 1873, Cravens and wife conveyed the land in controversy to the appellee William D. Wilson by warranty deed, for the expressed consideration of \$2,500, and on the 13th day of January, 1874, William D. Wilson and wife conveyed to the appellee Thomas E. Wilson an undivided interest in the land by quitclaim deed.

The jury do not find the extent of the interest conveyed by the latter deed, but find that the consideration was \$900.

The Wilsons are in possession, claiming title to the land through said conveyance from Cravens.

The twenty-seventh finding is as follows: "27. We find that William D. Wilson and Thomas E. Wilson have no title whatever in or to the real estate described in the complaint, or any part of the same, or as described in the cross-complaint herein."

The jury then find that the appellant is the owner in fee of the undivided one-half in value of the property, and that the remaining heirs of Kitts are the owners in fee of the residue, specifying their respective shares.

They also make the following finding: "We find that the Wilsons purchased this land with full notice, as set forth in the complaint."

The foregoing abstract not only states every material fact found by the jury necessary to a determination of the controversy, but, in addition, some facts discussed and apparently relied on by counsel, but which we deem wholly immaterial and foreign.

On the 17th day of May, 1888, while the trial before the last was in progress, James B. Kitts, one of the appellants, filed a written disclaimer, and on the next day the court, on motion of Wilson and Wilson, rendered judgment in their

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favor against him on the cross-complaint, quieting their title as against him, and for costs.

Before considering the other questions presented by the record, we will say, of the so-called special finding numbered 27, that it is not a finding of a fact proper to be incorporated into a special verdict.

It can be regarded as no more than the conclusion reached by the jury as to the legal effect of the facts previously found by them relative to the title of Wilson and Wilson. If it can be regarded as a finding of fact at all, it is no more than a general finding.

Whether the parties to the litigation had title to the property in controversy is a mingled question of law and of fact, and must be determined by the court applying the law to the facts found. The question of practice involved does not differ in principle from that involved in the case of *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186. See, also, *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Sohn v. Cambern*, 106 Ind. 302.

The same may be said of the findings that the appellant is the owner in fee of the undivided one-half of the property in controversy, and that the remaining heirs of David H. Kitts are the owners in fee of the residue.

The findings are unauthorized, and must be disregarded.

The position of the appellant is, that the jury having found that the conveyance by Kitts and wife to Cravens was regarded by them as a mortgage, the title to the land remained in Kitts, subject to the mortgage, and at his death descended to the appellant as his widow, and to his children; that Wilson and Wilson having taken title with notice of the facts which gave to the deed its character of a mortgage, they acquired no greater or better title than their grantor Cravens; that the title of Kitts' heirs can only be divested through a foreclosure of the mortgage; and that, there hav-

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ing been no foreclosure, they are entitled to partition, as they would be if the mortgage had been in the usual form and not foreclosed.

The appellees, however, contend that, notwithstanding the deed was intended as between the parties to be merely a security for a debt, and hence, in equity, only a mortgage, the jury having found that the intention of the parties in giving to it the form of an absolute conveyance was to defraud the creditors of Kitts, equity will refuse to aid them by declaring it a mortgage, and will leave them where it finds them; that the appellant and the children of the grantor all claim as his heirs, and succeed to his rights, and no more, and that, as he could not appeal to a court of equity to declare the deed a mortgage, they can not; that, if this is not true as to the appellant, they say that the jury expressly find that she was a party to the fraud, and, hence, is in no better situation to appeal to a court of equity for relief than her husband was. They further insist that as there is no finding that the debt secured has been paid, and no offer to pay or to "do equity," the appellant has no standing; that her only right would be that of redemption, and that before she can be entitled to relief she must do equity herself, by paying, or offering to pay, the mortgage debt; also, that her action in applying for and securing the decree of the court setting off to her and vesting in her the title to the estate left by her husband, is an admission of record, which estops her to afterward claim title to this land as against those who bought it thereafter.

The appellees assigned cross-errors, alleging that the court erred in adjudging that the appellant was entitled to recover any portion of the land in controversy, and in refusing to render a decree quieting their title to the entire land.

James B. Kitts has also assigned as separate error the action of the court in rendering judgment against him on his disclaimer, while the remaining heirs of David H. Kitts, ap-

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pellants, insist that the court erred in not adjudging them entitled to the undivided one-half of the land.

Even if we were to disregard the specific finding of the jury that, as between Cravens and Kitts, they regarded the conveyance of January 13th, 1864, as a mortgage, its character is clearly fixed by the other facts found. It is clearly a mortgage to which the parties have, for reasons of their own, seen fit to give the appearance and form of an absolute conveyance. No question is better settled in this State than that a conveyance of land, absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of repurchase, or other agreement, may, in equity, by means of extrinsic and parol evidence, be shown to be in reality a mortgage as between the original parties, and as against all those deriving title from or under the original grantee, who are not *bona fide* purchasers for value and without notice. Pomeroy Eq. Jur., section 1196; *Herron v. Herron*, 91 Ind. 278; *Parker v. Hubble*, 75 Ind. 580; *Landers v. Beck*, 92 Ind. 49; *Cox v. Ratcliffe*, 105 Ind. 374; *Voss v. Eller*, 109 Ind. 260.

Counsel for the appellants err, however, in assuming that the mere existence of the facts which change its apparent character of an absolute conveyance into that of a mortgage is alone sufficient to determine the rights of the parties, and that, because facts existed, and have been found by the jury, fixing upon the instrument that character, it is, therefore, to be considered as it would have been considered if it had been executed in the form of an ordinary mortgage. They also err in assuming that because in this State a mortgage gives a mere lien upon land, and conveys no title her rights are different and her position better than if a mortgage conveyed title.

In taking these positions counsel must, of course, act on the additional assumption that the court can and will necessarily take notice of the existence of the facts changing

an instrument which to all outward appearances is a warranty deed conveying title into a mere mortgage. Can the court consider and act upon such facts?

Prima facie the instrument is an absolute deed. Courts of equity, as well as courts of law, will so recognize and treat it in the absence of affirmative evidence changing its apparent character.

He who asserts that it is other than it appears to be, must establish that fact by evidence. Such evidence will only be heard by a court of equity, which, looking through the entire transaction, disregards the form of an instrument, and takes note of the actual purpose of the parties. In an action at law the parties would not be allowed to show that an apparent deed was only a mortgage. Before the adoption of the code, authorizing the same court in one action to administer both legal and equitable relief, a party could not defend in ejectment on the ground that an apparent absolute deed was only a mortgage, until he had first obtained a decree in equity declaring its true character. *Parker v. Hubble, supra*.

Now, while the courts will, in the same action, administer both legal and equitable relief, they are, as courts of equity, governed by the same rules and act upon the same principles as before.

If, when the question was presented to the circuit court, any fact was disclosed which showed that the party who invoked the aid of the court was without standing in a court of equity, that court had no power to extend its aid. And, as the case comes to us, notwithstanding the findings by the jury, we are compelled to first examine all of the facts found to know if it is a case where a court of equity can interpose.

Therefore, notwithstanding the existence of facts which would change the apparent character of the instrument and demonstrate that it is a mere mortgage, we must at the outset consider the standing of the appellants and inquire if

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they come with clean hands. Has their conduct, or the conduct of those through whom they claim, been such that we can hear them, or consider the facts they present? If they are not entitled to be heard, those facts must be disregarded; and the instrument must, so far as they are concerned, retain the apparent character which the parties to it have given it, and be treated as an absolute deed conveying title.

The fact that the Wilsons when they bought had notice of the facts which changed the apparent deed to a mortgage, is only material if the appellants can avail themselves of these facts.

The jury found that the deed to Cravens was executed for the fraudulent purpose of cheating, hindering and delaying the creditors of Kitts.

A conveyance of property made to hinder or delay creditors is illegal as to creditors only.

As between the parties it is good, and a court of equity will never interfere at the instance of a fraudulent grantor to aid him in the recovery of his property. Pom. Eq. Jur., section 401; *Edwards v. Haverstick*, 53 Ind. 348; *Henry v. Stevens*, 108 Ind. 281; *Sweet v. Tinslar*, 52 Barb. 271; *Bolt v. Rogers*, 3 Paige, 154; Bump Fraud. Conv., sections 395, 397, 398.

This rule has been applied repeatedly, when, as in this case, a court of equity was asked to declare a deed absolute in its terms a mortgage. The rule is thus stated in *Jones Mortgages*, section 283: "The grounds on which courts of equity admit oral evidence, to show that a deed absolute in form is in fact a mortgage, are purely equitable, and relief is refused whenever the equitable consideration is wanting. Therefore, when a debtor has made an absolute conveyance of his land to one creditor for the purpose of defrauding his other creditors, he is in no condition to ask a court of equity to interfere actively in his behalf to help him get his land back again, and thus secure to him the fruits of his fraudulent devices. 'One who comes for relief into a

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court whose proceedings are intended to reach the conscience of the parties must first have that standard applied to his own conduct in the transactions out of which his grievance arises. If that condemns himself, he can not insist upon applying it to the other party.' An oral agreement between the debtor and creditor who took the conveyances whereby the latter agreed to reconvey the land upon payment of the debt due him, is not deemed in such case an equitable ground for relief. The court will interfere only for the benefit of those whom the debtor intended to defraud." See, also, cases of *Parrott v. Baker*, 82 Ga. 364; *Ybarra v. Lorenzana*, 53 Cal. 197; *Hassam v. Barrett*, 115 Mass. 256.

That which would have denied to Kitts in his lifetime a hearing in a court of equity stands equally as a barrier in the way of those who claim as his heirs. They could acquire no greater rights by inheritance than he had. The heirs of a fraudulent grantor can no more question the validity of the conveyance than he can himself. *Wilson v. Campbell*, 119 Ind. 286 (290); *Laney v. Laney*, 2 Ind. 196; *Springer v. Drosch*, 32 Ind. 486; *Stewart v. Ackley*, 52 Barb. 283 (287); *Moseley v. Moseley*, 15 N. Y. 334; *Battle v. Street*, 85 Tenn. 282. This not only applies to such of the children and grandchildren of Kitts as are parties, but also to the portion claimed by the appellant by inheritance from her two deceased children. The appellees insist that the one-third which she takes as widow she takes subject to the same infirmity; that she takes it as heir, and thus is upon the same footing with the other heirs. This contention can not be sustained. The rights of a widow in the lands of her deceased husband are not merely those of an heir. An heir has no interest in the lands of his ancestor until the ancestor's death. The wife, however, has an inchoate interest in all the husband's lands from the instant he acquires them. It is this inchoate interest which at his death under our statute ripens into a fee, as it may do in certain contingen-

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cies even during the life of the husband. That which will deny to the fraudulent grantor and to his heirs the right to equitable assistance in declaring an apparently absolute deed a mortgage will not necessarily affect the right of his widow. Although she may join with him in executing a conveyance of his land which is intended to defraud his creditors, if she has no knowledge of the intended fraud she is not affected by it. If, however, she not only has knowledge of the fraud but participates in it, she will have no better standing in a court of equity than the husband.

The finding above referred to, that the deed to Cravens was executed for the fraudulent purpose of cheating, hindering and delaying the creditors of Kitts, is general in its terms, and applies alike to David H. Kitts and to the appellant. Of her the jury makes the additional finding that while she did not know of her husband's liability on Vandever's bond, she did know from Cravens that the conveyance was made to avoid payment of a \$3,000 liability growing out of Vandever's defalcation and a certain execution. She was therefore a participant in the fraud, and a court of equity will not aid in restoring to her an interest in property which she knowingly and actively aided her husband to fraudulently withhold from his creditors. *Barrow v. Barrow*, 108 Ind. 345; *Noble v. Noble*, 26 Ark. 317; *Biering v. Flett* (Tex.), 7 S. W. Rep. 229; *Blair v. Smith*, 114 Ind. 114.

She will be left where she has knowingly and voluntarily placed herself; and to her, as to the remaining parties who claim through her husband, the deed is in law and in fact what it purports to be.

It is unnecessary for us to consider what, if any, effect should be given to her act in having the property belonging to her husband's estate set over to her.

The appellant insists that under the findings the appellees are not entitled to relief on their cross-complaint, for the reason that the special verdict does not find the specific interest conveyed by William D. Wilson to Thomas E. Wil-

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son. This is a matter with which the appellant has no concern.

The facts found show that between them the two Wilsons own all of the land, and that neither the appellant nor any of the other parties has any interest in any of it. There is no controversy between the Wilsons over the matter. Their cross-complaint, in which they join, avers that the interest owned by William D. is the undivided three-fourths, and that of Thomas E. is the undivided one-fourth. This, as between them, must be taken as true, and is conclusive.

The only remaining question is, did the court err in rendering judgment against James B. Kitts for costs on his disclaimer?

We think this was clearly right. If, when he first appeared to the action, he had filed his disclaimer, he would have been entitled to a judgment for costs under section 1072, R. S. 1881. Instead of doing this, however, he contested the claim of the appellees, and only files a disclaimer after years of active litigation.

The appellees were entitled to a judgment against him for all costs made by him while actively contesting their right to the property.

The law is with the appellees upon the facts stated in the special verdict, both upon the assignment of errors made by the appellant and upon the cross-assignment of errors.

The judgment of this court upon the assignment of errors is against the appellant, and upon the cross-assignment is for the appellees Wilson and Wilson.

Affirmed upon the assignment of errors, and reversed upon the cross-assignment of errors.

MILLER, J. took no part in the consideration or decision of this cause.

Filed Dec. 8, 1891; petition for a rehearing overruled Feb. 26, 1892.

Shortle et al. v. The Louisville, New Albany and Chicago Railway Co.

No. 15,621.

130	505
131	339

**SHORTLE ET AL. v. THE LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY.**

LIMITATION OF ACTIONS.—Eminent Domain.—Condemnation for Railroad Right of Way.—Recovery of Damages.—Statute Applicable.—In a proceeding under sections 905-912, R. S. 1881, against a railroad company to recover damages occasioned by the appropriation of land taken for a right of way, section 292, R. S. 1881, limiting actions for injuries to real property to six years does not apply. Under section 294, R. S. 1881, such a proceeding must be commenced within fifteen years after the cause of action accrues.

From the Tippecanoe Circuit Court.

J. V. Kent, for appellants.

E. C. Field and *J. F. McHugh*, for appellee.

COFFEY, J.—On the 4th day of June, 1888, the appellants filed their complaint in the Clinton Circuit Court, praying that their damages, occasioned by the appropriation of certain described land taken for a right of way for railroad purposes, might be assessed under the provisions of sections 905-912, R. S. 1881.

It appears from the complaint that Samuel C. Shortle died the owner of the land described in the complaint, on the 19th day of January, 1866, leaving his widow, Elizabeth Shortle, and the appellants, his children and grandchildren, as his only heirs at law; that he left a will, which has been duly probated, by the terms of which he devised the land to his widow during her natural life; and that she took possession of said land and occupied the same until her death, which occurred in the year 1888. In the year 1880, the Indianapolis, Delphi and Chicago Railroad Company took possession of the strip of land described in the complaint, as a right of way, and graded the same, put down its railroad track, and the same has ever since been used for that purpose. The same was taken without the consent of the appellants, and without the assessment or the payment of the

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damages occasioned thereby. The appellee is the successor of the Indianapolis, Delphi and Chicago Railroad Company, and is now in the possession and use of the land, operating its railroad thereon. The complaint prays for a writ for the assessment of the damages occasioned by the appropriation of the right of way mentioned therein, and the construction and operation of the railroad over the land.

The appellee answered the six years' statute of limitations, to which the court overruled a demurrer.

The sole question presented for our decision relates to the correctness of the ruling of the circuit court upon this demurrer.

If the rights of the appellants are barred by the six years' statute, the judgment below should be affirmed; otherwise it should be reversed.

It is not claimed that any provision of the statute under which this proceeding is had limits the time within which it shall be instituted; but the claim of the appellee is, that an entry upon land for the purpose of constructing a railroad, without the consent of the owner of such land, and without the assessment and tender of the damages occasioned thereby, is a trespass, an injury to property, the right to sue for which is barred by the provisions of section 292, R. S. 1881. This section provides that actions for injuries to property, damages for the detention thereof and for the recovery of the possession of personal property shall be commenced within six years after the cause of action accrues.

In the case of *Midland R. W. Co. v. Smith*, 125 Ind. 509, which was a proceeding similar to the one involved here, the question as to whether the six years' statute of limitations or the fifteen years' statute was applicable, was argued by counsel, but it was found not necessary to decide the question, for the reason that the cause of action did not accrue six years prior to the commencement of the suit.

In the case of *Strickler v. Midland R. W. Co.*, 125 Ind. 412, it was held that the appellant had the right to sue for

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trespass or to pursue the statutory remedy, as he might elect, but, inasmuch as he brought his action for trespass, his right to recover was barred by the six years' statute of limitations. See, also, *Porter v. Midland R. W. Co.*, 125 Ind. 476.

The question in this case is squarely presented as to whether the same statute is to be applied to the statutory proceeding now under consideration.

In the case of *Forster v. Cumberland Valley R. R. Co.*, 23 Pa. St. 371, it was held, following the case of *Union Canal Co. v. Woodside*, 11 Pa. St. 176, that an application for a writ to assess damages under statutory provisions somewhat similar to the provisions in our statute was in substance an action of trespass, to which a statute of limitations upon the subject of trespass applied; but this case was greatly modified by the later case of *Delaware, etc., R. R. Co. v. Burson*, 61 Pa. St. 369.

In the latter case, after quoting the statute limiting actions for trespass to six years, the court said: "I think it is not susceptible of doubt that the Legislature meant only to limit suits and actions known to common law proceedings or forms of action. The case we are considering is a statutory proceeding exclusively, although common law forms may be used in the process of the pleadings on appeal. * * * The defendant has no right to complain of delay as a reason for invoking the statute; the company might and ought to have proceeded and had the damages assessed and paid them, if it did not intend that the plaintiff's intestate might take her time to test the damage, inconvenience or otherwise, that the road would be to her property before proceeding."

The writ provided for by our statute is not confined to cases of trespass, but applies also to cases where land has been taken for the construction of a railroad under an implied parol license; and where a railroad company enters upon land, and constructs its road without objection from the owner, the law implies a license. While it is true that the owner may maintain an action of trespass against a railroad

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company for entering upon his land without his consent, he can not, in such action, recover for the value of the land appropriated, nor does such action vest title to the land in the company. *Anderson, etc., R. R. Co. v. Kernodle*, 54 Ind. 314.

The proceeding, therefore, now under consideration, involves the recovery of damages that could not be recovered in an ordinary action of trespass, and is something more than that action.

For these reasons our conclusion is that the statute limiting actions of trespass does not apply to this, which is purely a statutory proceeding.

As there is no other statute limiting the time within which proceedings of this kind shall be commenced, it is governed by section 294, R. S. 1881, which limits the time to fifteen years.

It follows from what we have said that the court erred in holding that this proceeding was barred by the six years' statute of limitations.

Judgment reversed, with directions to the circuit court to sustain the demurrer of the appellants to the answers of the appellee.

Filed March 12, 1892.

130	508
131	439
130	508
135	47
130	508
150	475

No. 15,087.

**ARMSTRONG ET AL. v. THE FARMERS' NATIONAL BANK
OF FRANKFORT.**

PLEADING.—*Exhibit.*—*Supplying Omission in Pleading.*—A paper not properly an exhibit can not supply an omission in the pleading.

PLEADING AND SURETY.—*Replevin Bail.*—*Sale of Surety's Land Before that of Principal.*—*Waiver.*—*When Right to Subrogation Ceases.*—A replevin bail by voluntarily paying the judgment against his principal does not lose his right to be subrogated to the lien of the judgment; nor does he lose such right if he permit his own land to be levied upon and sold

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without compelling the executive officer to first levy upon the land of the principal; neither does mere procrastination, not extending beyond the expiration of the lien of the judgment, defeat his right.

From the Clinton Circuit Court.

J. V. Kent, for appellants.

S. H. Doyal and *P. W. Gard*, for appellee.

McBRIDE, J.—The appellee by this proceeding sought to enjoin the sale by the sheriff of Clinton county of certain land levied upon by him.

The only question we deem it necessary to consider is the sufficiency of the complaint, which was properly and seasonably challenged by demurrer.

While the suit was brought to enjoin the sale of land, the complaint contains no description whatever of the land. Reference is made to an exhibit, which is said to be attached to the complaint, and to contain a description of the land in question, but the exhibit forms no part of the complaint, and can not be considered for any purpose. While the code provides for the filing, in certain cases, of papers, or copies, as exhibits, it gives no warrant for the practice here attempted. The so-called exhibit is not in any sense a writing, or a copy of a writing, upon which the complaint is founded, but is simply one of the essential averments which the pleader has entirely omitted, and has sought to bring in by reference to some other paper. If the particular averment here in question may be omitted, and thus supplied, any material averment in a pleading may with equal propriety be supplied in a similar manner. *Wilson v. Vance*, 55 Ind. 584; *Knight v. Flatrock, etc., T. P. Co.*, 45 Ind. 134; *Pollard v. Bowen*, 57 Ind. 232; *Cassiday v. American Ins. Co.*, 72 Ind. 95; *Huseman v. Sims*, 104 Ind. 317; *Dumbould v. Rowley*, 113 Ind. 353, with many other cases.

The practice is inadmissible in any case, but is especially objectionable where, as in the case at bar, the pleading is required to be verified.

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The complaint is also fatally defective upon other grounds. It is averred that the appellee acquired title to the land through a sheriff's sale, and has since conveyed it to various parties by warranty deeds, and brings this suit for the protection of its grantors, and to avoid liability on its covenants of warranty. The sale through which it claims was made under a judgment recovered by it against one Isaac D. Armstrong and another, March 14th, 1877. The lands were levied upon and sold as the property of said Isaac D. Armstrong, and bid in by the appellee August 12th, 1882. March 15th, 1876, a judgment was recovered against said Armstrong and another by one Burns. On this judgment the appellant became replevin bail. June 2d, 1876, Isaac D. Armstrong conveyed to the appellant certain real estate, which, in common with the land in controversy, was subject to the lien of both judgments. This real estate, thus conveyed to the appellant, was afterward levied upon and sold to satisfy the Burns judgment. When this was done does not appear from the complaint, except that it was prior to the appellee's sale of August 12th, 1882.

The sale which this action was brought to enjoin was upon an execution which the appellant had caused to issue on the Burns judgment for his use as replevin bail. The appellee avers that when he bid in the land at his own sale he had no notice that the Burns judgment was not satisfied by the former sale, or that the appellant had paid it, or that it was in any manner a lien upon the land.

As we understand his contention, it is that the appellant, by allowing his land to be sold to satisfy the Burns judgment, instead of compelling the officer to first exhaust the property of his principal, waived his rights as replevin bail as against the appellee; that such conduct justified the appellee in the belief that the Burns judgment was fully satisfied and discharged by the first sale, and, coupled with the additional facts that the appellant's property, being conveyed

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to him after the lien of the Burns judgment had attached to it, was levied upon as the property of Isaac D. Armstrong, and that the appellant had delayed the enforcement of his rights as replevin bail for eight years, together estop him from now enforcing it as against the appellee.

While section 698, R. S. 1881, makes it the imperative duty of the officer to exhaust the property of the judgment debtor before levying upon or selling the property of the replevin bail, the right of the surety to the protection afforded him by section 1214, R. S. 1881, does not depend upon whether or not the officer has discharged that duty. The latter section provides that when the replevin bail is compelled to pay, or "shall make any payment which is applied upon such judgment," etc., it shall not be discharged by such payment, but shall remain in force for his use. Whether the payment is made in money or by the sale of his property is not material.

Nor is compulsory payment necessary. He may pay voluntarily, and will be entitled to keep alive and enforce the judgment for his use.

While, on the facts as pleaded, it was the duty of the sheriff to have first levied upon and sold the property of the judgment debtor, Isaac D. Armstrong, and while he might have been compelled by the appellant to do so, it can not be said that the appellant waived any right by not compelling the performance of duty by the officer. If in fact his property was sold to satisfy the judgment, he is entitled to have it kept alive and enforced for his use. This he may do at any time during the existence of its lien. Mere delay upon his part, if not prolonged until the lien of the judgment has expired, can not of itself operate as a waiver of his right. Nor can it of itself and alone serve to estop him. The entering of replevin bail is an act of which all persons are bound to take notice, and the law, which all are presumed to know, charges them with knowledge of his rights.

Barr v. Vermilya.

The court erred in overruling the demurrer to the complaint.

Judgment reversed, with costs.

Filed March 15, 1892.

No. 15,558.

BARR v. VERMILYA.

PRACTICE.—*Reversing Case on Weight of the Evidence.*—The Supreme Court will usually not reverse a case on the evidence, although the appellant has the preponderance.

From the Jackson Circuit Court.

W. K. Marshall and D. A. Kochenour, for appellant.

R. Applewhite, J. F. Applewhite and B. E. Long, for appellee.

MILLER, J.—The appellee sued the appellant to quiet the title to a small tract of land. The complaint was answered by a general denial, and the cause submitted to the court for trial, who found for the plaintiff.

The only question discussed is the sufficiency of the evidence to sustain the finding and judgment of the court.

It is agreed that both parties claim title under Peter Burk.

The evidence shows, without dispute, that Peter Burk sold the property to the appellee, in January, 1888, and conveyed the same to him by two separate general warranty deeds,—one executed January 6th, 1888, in which he was joined by George Burk and Amos Burk and wife, but not by Minerva Burk, his own wife; the other executed by Peter Burk and wife, on the 29th day of August, 1888. The land had been held by Peter Burk, George Burk and Amos Burk, as tenants in common, but, some time before the sale to Vermilya, had been set off to Peter, in an equitable partition. George and Amos joined in the conveyance to perfect the title. At

Barr v. Vermilya.

the time of the first conveyance, Peter Burk and his wife were separated, and she refused to join in the deed. After a reconciliation between them, the second deed was executed.

The evidence shows, without dispute, that the consideration agreed upon was fully paid, partly to Peter Burk, and partly to his wife.

This makes up the chain of title by which the appellee claims the land.

The evidence on the part of the defendant, who is the appellant here, tends to show that some time prior to the first conveyance made to the appellee, Vermilya, Peter Burk exchanged the land in controversy with the appellant, for another tract of land, and that under the contract each party took possession of the property which he was to receive; that the contract was a parol one, and that no deeds had been executed between them to perfect the exchange. It is conceded that at the time Burk sold the land to the appellee it was in the possession of the appellant.

The appellee meets this evidence with the claim that no such exchange of property ever took place, but that the possession of the appellant was by the mere license of Burk; also that, if such contract of exchange ever took place between Barr and Burk, such contract had been rescinded, and that Barr had sold and conveyed to another the land which he was to convey to Burk in exchange for the property in dispute.

This is denied by the appellant, who claims that he had purchased the property of Burk before he conveyed it away.

No useful purpose would be subserved by setting out the evidence in this opinion. As it comes to us in the record, it seems to preponderate largely in favor of the appellant. It shows, however, that the appellee was, if the appellant owned the land which Burk sold and conveyed to him, grossly imposed upon, and that Peter Burk was the son-in-law of the appellant, and that all the material evidence in

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the cause, in favor of the appellant, was given by himself and Burk, and by members of their families; that both the appellant and Burk were impeached, as witnesses, by the testimony of many of their neighbors, and no effort was made to sustain their characters. We are unable to say that this, when taken in connection with the statements and admissions of Burk made as a part of the *res gestæ*, and the statements of the appellant made to the appellee when asked to vacate the premises, and the inferences to be drawn from the conduct of the parties and the logic of events, may not have been sufficient to raise such a conflict of evidence as to forbid us from interfering with the conclusion arrived at by the court.

Judgment affirmed.

Filed March 15, 1892.

No. 14,762.

TUCKER, TREASURER, ET AL. v. SELLERS.

PRACTICE.—Supreme Court.—*Failure to Specifically Point Out Defects in Pleading.*—Defects in a pleading which are not apparent from a bare statement, must be specifically pointed out by counsel, and they must support their position by argument, and, if need be, by the citation of authorities; and unless this is done, the court will assume that no defects exist in the pleading.

JURISDICTION.—*When Collateral Attack will not Lie.*—Where there is general jurisdiction of the subject, and the jurisdiction of the particular case depends upon the facts, the decision of the tribunal making it is conclusive against a collateral attack.

SAME.—By Consent.—Consent or acquiescence can not confer jurisdiction of the general subject; but jurisdiction of a particular instance falling within the scope of the general subject may be given by consent, either express or implied.

SAME.—Notice Necessary.—There can be no jurisdiction without notice.

SAME.—Notice.—Sufficiency.—If the notice given is sufficient to call into exercise the authority of the court and invoke its judgment upon the jurisdictional facts, the decision of the court that there was notice can not be held void, and its judgment on that ground collaterally attacked.

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130	507
130	514
134	552
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137	385
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143	89
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146	167
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149	176
150	423
130	514
153	261
130	514
154	378
155	388
130	514
159	522

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SAME.—*Defective Notice.*—If there is a notice provided for by law, and notice is assumed to be given under the law, then there is jurisdiction, although the notice is defective.

GRAVEL ROADS.—*Collateral Attack on Decision of Board of County Commissioners.*—The decision of a board of county commissioners that a petition for a free gravel road is sufficient, and that it is signed by the proper number of freeholders, is conclusive as against a collateral attack.

SAME.—*Extent of Power of County Board.*—A board of county commissioners have not only power to order free gravel roads to be constructed, but also to order bonds to be awarded for its construction.

SAME.—*Notice of Assessment.*—The board has no authority to order the making of an assessment, or second assessment, without first giving notice thereof.

SAME.—*Assessment.*—*When Effective.*—*Approved.*—The assessment for a free gravel road does not become effective until approved by the board of county commissioners.

SAME.—*Injunction.*—*Bringing Suit Before Assessment Under Defective Notice.*—If a suit is brought to enjoin an assessment about to be made under a defective notice, an answer setting up such notice and an assessment made subsequently to the commencement of such suit, is insufficient.

From the Putnam Circuit Court.

J. A. Smiley, W. G. Neff and J. L. Myers, for appellants.
M. A. Moore and G. C. Moore, for appellee.

ELLIOTT, C. J.—The appellee seeks by his complaint an injunction against the appellant as treasurer, restraining him from collecting an assessment levied upon the land of the former for the construction of a free gravel road. The essential averments of the complaint are that the viewers reported that the land of the appellee was not liable to assessment; that he was informed by the board of commissioners and the viewers that he could not contest the assessment, as his land was not within the territory subject to assessment, and that he was not notified of any subsequent proceedings. The appellants' counsel have not pointed out any objections to the complaint, but say, in general terms, that it is not good. We must, under the long-settled rules of the court, decline to search for defects in the complaint, and assume that none exist. Counsel can not, by general assertions in

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their briefs, secure a reversal of a judgment because of supposed defects in a pleading. Defects which are not apparent from a bare statement, must be specifically pointed out by counsel, and they must support their position by argument, and, if need be, by the citation of authorities.

The answer is long, but we think its material allegations can be briefly stated. In substance, the facts stated are these: A petition for the road named in the complaint was filed, and proper steps taken up to the report of the viewers. The viewers, as we understand the answer, did not include in their report the land of the appellee. The reason for not including it was that it was included in a report made upon a petition for another road. The petition for the first road, as we may designate the one not named in the complaint, was dismissed. After this petition was dismissed, the board ordered the lands that had been omitted from the former report upon the second road (the one described in the petition) to be assessed. In obedience to this order, the engineer placed the omitted lands upon the map prepared by him, and the board, in regular session, directed the viewers to view the lands, but by inadvertence this order was not entered of record. The plaintiff's land is within one-fourth of a mile of the line of the road. The assessment upon his land was just and equitable. After the viewers made their report, the auditor gave the proper notice of the meeting of the board appointed to hear and determine complaints of property-owners. At the meeting of the board "plaintiff," as the answer avers, "appeared, and filed written objections to so much of the assessment as included his land, which were overruled, but no appeal was taken." In June, 1887, the auditor reported that the estimated cost of the road reported to the board was erroneous, and that it would cost \$5,924.22 more than the sum estimated by the engineer. Acting upon the report of the auditor, the board ordered a reassessment to be made. Notice of the time and place of the meeting of the board to hear complaints against the report making the reassessment

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was given. The original petition for the construction of the road was filed in 1883. The road was constructed under the contract awarded by the board, and was completed in 1885. Bonds were issued by the board to pay for the construction of the road.

The board of commissioners undoubtedly had jurisdiction of the general subject. It is, indeed, the court of exclusive original jurisdiction. Our decisions, as well as the decisions of many other courts, explicitly assert this general doctrine. The jurisdiction is not merely to order free gravel roads to be constructed, but to order lands to be assessed. *Chicago, etc., R. W. Co. v. Sutton*, ante, p. 405; *State, ex rel., v. Wolever*, 127 Ind. 306 (315); *Alexander v. Gill*, ante, p. 485; *Jackson v. Smith*, 120 Ind. 520 (522). As the board had jurisdiction of the general subject, its order that the petition for the road was sufficient, and was signed by the proper number of freeholders, is conclusive as against a collateral attack, such as that made in this case. *Board, etc., v. Hall*, 70 Ind. 469; *Hill v. Probst*, 120 Ind. 528; *Reynolds v. Faris*, 80 Ind. 14; *Hilton v. Mason*, 92 Ind. 157; *Strieb v. Cox*, 111 Ind. 299 (305), and cases cited; *Board, etc., v. Montgomery*, 106 Ind. 517 (521), and cases cited. It has been the rule in this State since the decision in *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind., 395, that where there is general jurisdiction of the subject, and the jurisdiction of the particular case depends upon the facts, the decision of the tribunal is conclusive as against a collateral attack. This rule has been again and again asserted by our own court, as well as by the Supreme Court of the United States, and many other courts. *McEneney v. Town of Sullivan*, 125 Ind. 407 (412), and cases cited. See authorities cited in *Elliott Roads and Streets*, p. 219, notes 3 and 4. It can not be said in this instance that the proceedings were *coram non judice*, for there was a court, there was authority over a general subject, and there was an assumption of jurisdiction.

There was, it is very clear, jurisdiction of this particular

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instance up to and including the time the appellee appeared before the board of commissioners and objected to the original assessment against his land. The law is that one who appears can not afterwards object that there was no jurisdiction over him and his property. *Washington Ice Co. v. Lay*, 103 Ind. 48. See, also, authorities cited in *Elliott Roads and Streets*, p. 245, note. We do not, of course, mean to be understood as affirming that parties may, by consent or acquiescence, confer jurisdiction of the general subject. That can only be conferred by law. But we do affirm that jurisdiction of a particular instance falling within the scope of the general subject may be given by consent, either express or implied. We are not, in this instance, confronted with the question whether there can be an estoppel in a case where its principal element is a judgment rendered in a case where there was an absolute and entire want of jurisdiction. Here, as we have seen, the law gives jurisdiction of the general subject, and there was, so far as the question is presented by this collateral attack, a rightful exercise of jurisdiction up to the proceedings relative to the order directing a reassessment. There was authority to order an additional assessment, and over that subject there was general jurisdiction. *Board, etc., v. Fullen*, 111 Ind. 410, and authorities cited; *Gavin v. Board, etc.*, 104 Ind. 201; *Campbell v. Board, etc.*, 118 Ind. 119, and authorities cited; *Rogers v. Voorhees*, 124 Ind. 469.

The authorities to which we have referred conclusively answer the contention of the appellee's counsel that the proceedings prior to the additional assessment are void, and may be overthrown by a collateral attack. We have many cases wherein it was held that the collateral attack was unavailing although there was much stronger ground for the overthrow of the entire proceedings than any here shown by counsel against the proceedings up to the order for a second assessment. *Otis v. De Boer*, 116 Ind. 531, and cases cited; *Muncey v. Joest*, 74 Ind. 409; *Brokaw v. Board, etc.*, 73

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Ind. 543; *Prezinger v. Harness*, 114 Ind. 491; *Johnson v. State, etc.*, 116 Ind. 374, and cases cited.

The question of difficulty is as to the proceedings subsequent to the first assessment, and the orders based on it. The authorities are decisively against the right to make an additional assessment without notice to the persons upon whose property the assessment is levied. While the authority to make such an assessment is undoubted, it is yet quite as certain that it can not be made without notice. The notice for the original assessment spends its force when that assessment is finally made; and a second assessment can not be made unless the land-owners are given "their day in court." The right to "a day in court" is a constitutional right that even an express statute can not take away. *Board, etc., v. Fullen*, 118 Ind. 158; *Gavin v. Board, etc., supra*; *Martin v. Neal*, 125 Ind. 547 (555); *Board, etc., v. Fullen, supra*; *Campbell v. Board, etc.*, 118 Ind. 119 (120); *Board, etc., v. Fahlor*, 114 Ind. 176; *Abbett v. Board, etc.*, 114 Ind. 61; *Board, etc., v. Gruver*, 115 Ind. 224; *Kuntz v. Sumption*, 117 Ind. 1. It is true that the object of the statute is to impose upon lands specially benefited by the construction of a gravel road the burden of paying the cost of constructing it, and to relieve the county from the burden. *Rogers v. Voorhees, supra*; *Board, etc., v. Fullen*, 118 Ind. 158; *Strieb v. Cox*, 111 Ind. 299. But this object can not be attained at the expense of the paramount constitutional right of the citizen to notice.

It is evident from what has been said that the pivotal question in this branch of the case is as to the effect of the notice given the property-owners to appear before the board of commissioners at the time and place designated, and interpose objections, if any they had, to the second or additional assessment. If that notice was sufficient to call into exercise the authority of the board and invoke its judgment upon the jurisdictional facts, the decision can not be adjudged void. This is so, for the reason that authority to

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decide is jurisdictional. *Board, etc., v. Markle*, 46 Ind. 96, and authorities cited; *De Quindre v. Williams*, 31 Ind. 444; *Lantz v. Maffett*, 102 Ind. 23 (28); *Snelson v. State, ex rel.*, 16 Ind. 29; *Jackson v. State, etc.*, 104 Ind. 516, and authorities cited; *Rhode Island v. Massachusetts*, 12 Peters, 657.

If there was notice provided for by law, and notice was assumed to be given under the law, then there was jurisdiction, although the notice may have been defective. *Muncey v. Joest, supra*; *Jackson v. State, etc., supra*; *Otis v. De Boer, supra*; *Hume v. Conduitt*, 76 Ind. 598; *McAlpine v. Sweetser*, 76 Ind. 78; *Hackett v. State, etc.*, 113 Ind. 532; *Kleyla v. Haskett*, 112 Ind. 515; *Adams v. Harrington*, 114 Ind. 66; *Ely v. Board, etc.*, 112 Ind. 361; *Essig v. Lower*, 120 Ind. 239 (245), and cases cited.

It is settled that the Legislature must prescribe some notice in such cases as this, but what the notice shall be is a legislative question, subject only to the limitation that it shall not be palpably unreasonable. The Legislature has exercised the authority to prescribe the notice that shall be given to property-owners who desire to lodge complaints with the board of commissioners against the assessments upon their lands, and the notice prescribed is reasonable and fair. Section 5096, R. S. 1881.

In our judgment the notice provided for in the statute to which we have referred does give the land-owners "their day in court." The assessment does not become effective until it is approved by the board of commissioners, and the notice prescribed affords the property-owners an opportunity to litigate the validity of the assessment. As there was notice before a final decision, there was jurisdiction. There was no question open except the validity and amount of the additional assessment; the question of the utility of the road and kindred questions were finally adjudicated by the prior orders of the board. The decision of the board of commissioners upon the additional assessment might have been appealed from in the same general mode as the original as-

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assessment. *Board, etc., v. Fullen*, 118 Ind. 158. But on such an appeal the validity of prior orders of the board could not have been litigated. As there was the legal and ordinary remedy by appeal, the appellee would have had no right to collaterally attack the proceedings by the extraordinary writ of injunction, if it be true that the proceedings were begun before his suit was commenced. *Sims v. City of Frankfort*, 79 Ind. 446, and cases cited; *Smith v. Goodnight*, 121 Ind. 312; *Bass v. City of Fort Wayne*, 121 Ind. 389, and cases cited.

We conclude that the additional assessment was not void, and that this collateral attack can not prevail against it, if the theory of the appellant's counsel that the additional assessment was made and placed upon the duplicate before this suit was begun, can be sustained.

The appellee's counsel maintain that the answer is bad, for the reason that it affirmatively shows that the additional assessment was not made until after the suit was begun. The brief in which this position is taken was filed more than two years ago, and no contradiction of the statement has been made, nor has there been any suggestion that there is an error in the recitals of the record. We must assume that the record is correct. According to the record, the suit was begun on the 11th day of February, 1887, and the first step towards making an additional assessment was taken on the 15th day of June, 1887. There was, therefore, no additional assessment when the suit was commenced, and if no such assessment, there could, of course, be no authority to place an additional assessment on the duplicate. If there was no such assessment, the appellee had a right to an injunction. We need not declare what the rule would be if the answer had pleaded the second assessment as a bar to proceeding after the suit was commenced, for no such question is presented.

Judgment affirmed.

COFFEY, J., did not take any part in the decision of the case.

Filed March 11, 1892.

Johns, Auditor, v. The State, *ex rel.* School City of Noblesville.

No. 16,363.

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165 370

JOHNS, AUDITOR, v. THE STATE, *EX REL.* SCHOOL CITY
OF NOBLESVILLE.

SCHOOLS.—Taxation.—Property of Persons Transferred for School Purposes.—

Where a person is transferred from one township, town or city to another for school purposes, he must pay on all his property, situated in the township, town or city to which he is transferred, as well as that situated in the township, town or city in which he resides, the same rate of school and poll taxes as is paid by the people of the township to which he is transferred, and for the use of that township, and it is the duty of the auditor to extend the assessment to such property and the poll of the person at the rate fixed by the corporation to which he is transferred.

From the Hamilton Circuit Court.

W. S. Christian, for appellant.

G. Shirts and *J. A. Kilbourne*, for appellee.

OLDS, J.—This is a proceeding to compel the appellant, the auditor of Hamilton county, to enter the property of certain persons residing without the limits of the city of Noblesville, but who had been transferred to the city of Noblesville for school purposes, on the tax duplicate of said city of Noblesville for taxation for school purposes, and to extend taxes and polls chargeable against such persons at the rate fixed for taxation for the city of Noblesville for school purposes, and the court rendered judgment against the appellant requiring him to make such entries.

The question presented arises on the ruling of the court in overruling appellant's demurrer to the alternate writ of mandate, which ruling is assigned as error.

Counsel for appellant says: "The question here presented, and the solution thereof, depend upon the construction of section 4468, R. S. 1881." This section reads as follows: "4468. *Assessment and collection.* The county auditor shall, upon the property and polls liable to taxation for State and county purposes, make the proper assessment of special school tax levied by the trustee, in the same manner as for State

Johns, Auditor, v. The State, *ex rel.* School City of Noblesville.

and county revenue, and shall set down the amount of said tax on his tax-list and duplicate thereof, as other taxes are set down, in appropriate columns; and he shall extend said assessment to the taxable property of the person transferred, which is situated in the township, town, or city to which the transfer is made, and to the property and poll of the person transferred, situate in the township, town, or city in which the person taxed resides, according to the rate and levy thereof in the township, town, or city which the transfer is made, and for its use; and said tax shall be collected by the county treasurer as others are collected, and shall be paid, when collected, to the treasurer for school purposes of the proper township, town, or city, upon the warrant of the county auditor. To enable county auditors correctly to assess said tax, the county superintendents of the several counties shall, at the time they make out and report to the auditor the basis of the apportionment of school revenue for tuition, as is required by section 4432, make out and report to said auditor a statement of transfers which have been made for school purposes according to sections 4472 and 4473."

Counsel contends that this section makes a distinction between persons owning property within the township, town or city to which they are transferred for school purposes, and persons residing without the township, town or city, and not owning property situate within the township, town or city to which they are attached for school purposes; that the auditor is required to extend the assessment to the taxable property, and place the same on the duplicate of the township, town or city to which the person is transferred, as to the property-owner in such township; while as to persons residing without, and owning no property in the township, town or city to which they are transferred, the auditor would have to extend the assessment, and place it upon the duplicate of the township, town or city in which the persons reside. The court in this case finds that the auditor was about to extend the taxes

Johns, Auditor, v. The State, *ex rel.* School City of Noblesville.

on the property of those persons residing without the city limits, and owning no property there, upon the duplicate of the township wherein they resided, at the rate assessed by the trustee of said township, instead of the rate fixed by the school city, and which was a less rate than that fixed by the city.

We can not concur with this view of counsel in his construction of section 4468, *supra*. We think this section of the statute contemplated that a person who is transferred from one township, town or city to another for school purposes shall pay taxes upon all of the property situate in the township, town or city to which he is transferred, as well as that situate in the township, town or city in which he resides, and poll of the person so transferred, at the rate assessed by the township, town or city to which he is transferred; and it is the duty of the county auditor to extend the taxes against such property at such rate. While the section designates the two classes of property separately, it fixes the rate upon all at the rate fixed for the corporation to which he is transferred. When the transfer is made for school purposes, it carries with it the property of the persons situate in the township, town or city in which the person resides for taxation; in other words, such of his property as is so situate in the township in which he resides is transferred with the person to the school township, town or city to which he is attached for taxation for school purposes, and makes it assessable as other property is assessable in such township, town or city, and it should be entered upon the duplicate, and such tax for school purposes extended against it, at the same rate and in the same manner as the property of other persons residing within the corporate limits of such township, town or city. The tax belongs to such township, and it is proper that the property should be entered on the duplicate of the township for such purpose. The conclusion which we have reached is in accordance with the views of the school officers of the State. In note 7 to section

McBride *et al.*, v. The State, for Use of Clandy, Drainage Commissioner.

4473, School Laws of Indiana, 1891, issued by Vories, Superintendent of Public Instruction, we find this statement made by Hon. Wm. C. Larrabee, Superintendent of Public Instruction from 1852 to 1853: "When a person is transferred for school purposes to any township in his own county, he must pay to the county treasurer, on all his property situated in the township in which he resides, the same rate of school and poll taxes as is paid by the people of the township to which he is transferred, and for the use of that township. If he owns property in another township, it must be taxed at the rate of the other property in that township, and for the use of schools therein." In note 5 to same section it is said: "The additional labor required of the auditor by a transfer is simply to enter the name of the party transferred and the value of his property situate in the township in which he resides upon the tax duplicate of the township to which the transfer is made, and assess upon such property the proper special school tax."

The conclusion we have reached leads to an affirmance of the judgment.

Judgment affirmed, with costs.

Filed March 12, 1892.

No. 15,614.

MCBRIDE ET AL. v. THE STATE, FOR USE OF CLANDY,
DRAINAGE COMMISSIONER.

DRAINAGE.—Ditch Assessment.—Collateral Attack.—Infancy of Land-Owners.

—An assessment on land owned by minors in aid of the construction of a public ditch is not void because no guardian *ad litem* was appointed to answer for such minors in the proceedings for the construction of the ditch, but is merely erroneous, and can not be collaterally attacked.

SAME.—Time of Referring Petition to Drainage Commissioner.—The fact that ten days did not intervene between the time the proceedings were docketed and the time at which the court referred the petition to the drainage commissioner, did not render the assessment void.

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McBride *et al.* v. The State, for Use of Clandy, Drainage Commissioner.

From the Clinton Circuit Court.

F. F. Moore, S. O. Bayless and C. G. Guenther, for appellants.

P. W. Gard, for appellee.

COFFEY, J.—This was an action by the appellee against the appellants, in the Clinton Circuit Court, to collect an assessment made in aid of the construction of a public ditch.

It appears by the record before us that a petition was filed in the circuit court of Clinton county, at the September term, 1888, praying for the construction of a public ditch in that county, under the provisions of the drainage act of 1885. Proof of notice was filed, the order referring the petition to the drainage commissioner was entered, the report of the commissioner was filed, which was approved, the work ordered, and the assessments confirmed.

After the work was ordered and the assessments confirmed, the appellants entered a special appearance to the proceeding, and moved the court to set aside the service of notice and order of confirmation, upon the ground that they were minors, and had received no notice of the proceeding.

After hearing proof, the court found that they had been legally notified of the pendency of the proceeding, and overruled their motion.

The appellants failing to pay the amount assessed against their lands to aid in the construction of the ditch, this action was brought to enforce the collection of such assessments.

The court overruled a demurrer to the complaint, and also sustained a demurrer to the second paragraph of the answer filed by the appellants.

These rulings are assigned as error.

It is contended by the appellants that the assessment against their land is void, for the reasons:

First. That it was made without the appointment of a guardian *ad litem* to answer for them, they being infants; and,

Second. Because ten days did not intervene between the

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date at which the proceedings were docketed and the date at which the petition was referred to the drainage commissioner.

As this is an action to enforce the assessments, the attack here made is collateral, and can not prevail, unless the defects in the proceedings urged against their collection are of such a character as to render the assessments void.

We have not inquired as to whether the code applies to proceedings to establish and construct public ditches, for assuming, for the sake of the argument, that it does, the assessments are not void because there was no guardian *ad litem* appointed for the appellants. A judgment against an infant without the appointment of a guardian *ad litem*, to answer for him, is erroneous, but not void. *Blake v. Douglass*, 27 Ind. 416.

Nor are the assessments void because ten days did not intervene between the time the proceedings were docketed and the time at which the court referred the petition to the drainage commissioner.

The court acquired jurisdiction over the subject-matter by the filing of the petition, and jurisdiction over the persons of the appellants by the statutory notice; and no order which it was authorized to make, entered after it acquired such jurisdiction, however erroneous, was void.

After notice a judgment rendered before the day fixed for answer is not void. *Essig v. Lower*, 120 Ind. 239.

Had the appellants applied to the court for permission to demur or remonstrate, a different question would have been presented, but they asked the court to set aside its proceedings for no other reason than that they were minors, and had no notice of the proceeding. Upon proof the court found the question of notice against them, and overruled their motion. Unless appealed from, this ruling was binding on the appellants.

There is no error in the record.

Judgment affirmed.

Filed March 15, 1892.

Anderson v. Hathaway.

No. 15,554.

ANDERSON v. HATHAWAY.

NEW TRIAL.—*Newly-Discovered Evidence.—Diligence.*—A new trial will not be granted on account of newly-discovered evidence, wherever, by the use of reasonable diligence, the evidence might have been discovered, and obtained for use at the trial. The facts constituting the diligence used before the trial to obtain the evidence must be pleaded, and it is not sufficient merely to allege that due diligence was used.

SAME.—*Complaint Must Show Materiality of Newly-Discovered Evidence.*—In an action for a new trial on the ground of newly-discovered evidence, the complaint is fatally defective if it fails to show, upon its face, the nature of the original action and the materiality of the newly-discovered evidence.

From the Lake Circuit Court.

T. J. Wood and M. Wood, for appellant.

T. S. Fancher, for appellee.

MILLER, J.—This was an action by the appellant against the appellee for a new trial, on account of newly-discovered evidence.

The appellee demurred to the complaint, and the demurrer being sustained, the appellant stood by his pleading and refused to amend, or plead over, and final judgment was rendered against him. The sufficiency of the complaint is the only question before us.

The complaint avers that the original cause was tried at the April term, 1888, of the Lake Circuit Court, and that the plaintiff did not discover the new evidence until January, 1889. It also avers that the plaintiff had no knowledge, at the time of the trial, that the witnesses, on account of whose testimony the new trial is sought, knew the facts which are disclosed in their affidavits.

There is no showing of diligence on the part of the plaintiff to discover and obtain the testimony of these witnesses prior to the trial and judgment, which is sought to be vacated.

It is a well-established rule of practice that a new trial

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The Chicago and West Michigan Railway Company v. Hunccheon et al.

will not be granted on account of newly-discovered evidence, where, by the use of reasonable diligence, the evidence might have been discovered and obtained at the trial; also, that the facts constituting the diligence used before the trial to obtain the evidence must be pleaded; it not being sufficient to allege that *due diligence* was used. *Allen v. Bond*, 112 Ind. 523; *Hines v. Driver*, 100 Ind. 315; *Keisling v. Readle*, 1 Ind. App. 240.

The complaint is also fatally defective for failing to show, upon its face, the nature of the original action and the materiality of the newly-discovered evidence. We can only infer from the evidence exhibited with the complaint in this action that it was for the specific performance of a contract.

The character of the action and the materiality of the newly-discovered evidence must be set forth in the body of the complaint, and not left to inference from the pleadings and evidence exhibited therewith. *Shewalter v. Williamson*, 125 Ind. 373; *Glidewell v. Daggy*, 21 Ind. 95; *Hines v. Driver*, *supra*.

Judgment affirmed.

Filed March 11, 1892.

No. 15,020.

THE CHICAGO AND WEST MICHIGAN RAILWAY COMPANY
v. HUNCHEON ET AL.

130 529
164 436

RAILROAD.—Condemnation for.—Entirety of Land Injured.—A line of railway was established across a farm which consisted of several different tracts of land, all lying contiguous to each other, and all used together as one farm. The line of railway thus established passed between certain of the tracts, separating them from each other.

Held, that this does not necessarily so separate the several tracts that they can not thereafter be considered together in assessing damages for the right of way of other railroads. They may, notwithstanding, still constitute but one farm.

SAME.—Assessment of Damages.—Lands to be Considered.—Jury.—Question for.—In assessing the amount of damages for a right of way where the land affected are parts of one farm, lying in one compact body, or, although composed of separate and distinct tracts or governmental subdivisions, the separate tracts lie contiguous, are owned by one person, and are used together as comprising one farm, whatever may be its size, damages should be considered and assessed for the entire farm;

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and whether the several tracts or subdivisions do lie contiguous, and are in fact used together as one farm, is a question of fact to be determined by the jury from the evidence.

SAME.—Easement.—Right of Way is Only.—A right of way acquired by a railroad company by an appropriation under the statute is a mere easement.

From the St. Joseph Circuit Court.

J. H. Bradley, for appellant.

C. F. Griffin, *D. J. Wile* and *J. B. Longworthy*, for appellees.

McBRIDE, J.—The appellees are the owners of one thousand acres of land in one body in Laporte county. The land is crossed by two lines of railroad other than that of the appellant. The Louisville, New Albany and Chicago Railway crosses it from north to south, and the Chicago, St. Louis and Pittsburgh Railroad crosses it from east to west. The appellant sought to appropriate a strip for its right of way, crossing the land from northeast to southwest. The necessary steps were taken under the statute; but the award of the arbitrators was unsatisfactory to the appellees. They filed exceptions, the cause was tried by a jury, and resulted in a verdict and judgment in their favor. The only question arising on this appeal grows out of the action of the court in admitting in evidence the testimony of certain witnesses. The land sought to be appropriated was all embraced in three quarter sections, which were described in the act of appropriation.

The exceptions upon which the case was tried were upon the ground of inadequacy of damages, and contained no description of the land, but alleged, as above stated, that it consisted of "about one thousand acres of land in one body."

The testimony admitted by the court, over the objection of the appellant, related to that portion of the land not described in the act of appropriation. The objections were twofold in their character, and were stated by the appellant,

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in its objection to the introduction of the testimony, as follows:

"Said tracts or parcels of land constitute no part of the particular tract or parcel of land from which the land appropriated is taken, but are each separate and distinct, and cut off from that part of the land out of which the plaintiff's right of way is taken, each by the right of way of an existing railroad, in operation at the time of the taking of the defendants' land by the plaintiff company; and that, therefore, defendants were not entitled to prove or recover any damages for injury thereto; and also, for the reason that there is not any place in the instrument of appropriation, warrant, warrant to, or report of the appraisers, nor in any exception filed by the defendant in this cause, nor in any of the pleadings filed herein, any allegation or claim that any lands situated in said section 16 are affected or damaged by the location of said plaintiff's railroad, or the appropriation herein, and that, therefore, said defendants were not entitled to show or recover for any injury to said tract, section 16, nor was any issue made or tendered thereto."

A similar objection was made to testimony relating to another tract lying in section eight.

Counsel for the appellant concedes that it is the general rule "that all land belonging to one proprietor, in a continuous (or contiguous) body, and which is used together for a common purpose, will be considered one tract, without regard to the government subdivision," but says: "There must, however, be a connected use of the entire land. The land in section 8, west of the Louisville, New Albany and Chicago Railroad, can not be considered as being a continuous part of the main body of appellees' land, because it is, and was, at the time of the construction of appellant's railroad, cut off from all of the other land by the New Albany Railroad, which was an existing railroad in operation at the time of the appropriation of appellees' land. Although this parcel of land had been owned by appellees for many years,

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they had never used it in connection with their other lands, nor was it capable of being so used. The Louisville, New Albany and Chicago Railroad separated it from the other land. There were no crossings in any way connecting it; and thus, for any practical purpose, it was as much a distinct and separate tract of land as if cut off from the other by a wall similar to the great wall of China."

To sustain the appellant's contention would be to take a question of this character from the jury, and say, as a question of law, that when a farm is crossed by a right of way of a railroad, it becomes and is thereafter two farms instead of one. The rule, applied to the appellees' land, as it will be with the appellant's right of way established, would require it to be considered as six distinct bodies of land, no one of which could be regarded as affected in value by the establishment of a railroad across any of the other tracts.

The appellant also seeks to have the court pass upon the constitutionality of section 1 of the act of April 8th, 1885 (Acts of 1885, p. 148; Elliott's Supp., section 1073), upon the ground that it is only by virtue of that statute, if at all, that farm crossings can be compelled, so as to connect the several tracts of land divided by the different railroads.

It is insisted that the statute is unconstitutional, and that there is, therefore, no way of connecting the several tracts of land, and, as a consequence, they must necessarily be considered as separate and distinct tracts, and not contiguous, or forming parts of one farm.

We find nothing in the record requiring us to determine the constitutional question thus suggested.

We are not disposed to adopt as correct the contention of the appellant that the mere establishment of a line of railroad across a tract of land so effectually and completely divorces the severed tracts that the law will declare that they can no longer constitute parts of one entire farm.

The right acquired by a railroad company by the appropriation of a right of way under the statute is a mere easement.

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Quick v. Taylor, 113 Ind. 540; *Cincinnati, etc., R. W. Co. v. Geisel*, 119 Ind. 77.

The mere imposition of a public easement upon and over a body of land does not of itself operate to divide it into separate farms. *St. Paul, etc., R. R. Co. v. Murphy*, 19 Minn. 500 (515).

The fact that parts of a farm are separated by a road or a canal will not affect the question, if such parts are in fact used together. Note to *Winona, etc., R. R. Co. v. Waldron*, 88 Am. Dec. 100 (119), and cases there cited.

The true rule in the assessment of damages for right of way is that where the lands affected are parts of one farm, lying in one compact body, or, although composed of separate and distinct tracts, or government subdivisions, the separate tracts or subdivisions lie contiguous to each other, are owned by one person, and are used together as comprising one farm, whatever may be its size, damages should be considered and assessed for the entire farm. This is true, whether the lands are all described in the articles of appropriation or not. The company asking the appropriation of the right of way is bound to take notice of the whole tract, and be prepared to meet a claim for damages to the whole. *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230; *Hartshorn v. B. C. R., etc., R. R. Co.*, 52 Iowa, 613; *Atchison, etc., R. R. Co. v. Gough*, 29 Kan. 94; *Winona, etc., R. R. Co. v. Denman*, 10 Minn. 267; *Wilmes v. Minneapolis, etc., R. W. Co.*, 29 Minn. 242; *Welch v. Milwaukee, etc., R. W. Co.*, 27 Wis. 108; *Bigelow v. West Wisconsin R. W. Co.*, 27 Wis. 478; *Reisner v. Atchison, etc., R. R. Co.*, 27 Kan. 382; *Kansas City, etc., R. R. Co. v. Merrill*, 25 Kan. 421; *Elliott Roads and Streets*, 190, and authorities cited in note 2.

Whether the several tracts or subdivisions do lie contiguous to each other, and are in fact used together as one farm, is a question of fact to be determined by the jury from the evidence. *St. Paul, etc., R. R. Co. v. Murphy*, 19 Minn. 500.

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In our opinion the court did not err in admitting the testimony. This is the only question presented and argued.

Judgment affirmed, with costs.

Filed March 11, 1892.

No. 15,185.

JOHNSON v. BROWN.

130 534
137 428
157 431

PRACTICE.—*Motion to Strike Out Pleading.*—*Overruling, Harmless Error.*—Overruling a motion to strike out a pleading is not ground for a reversal.

SAME.—*Objections to Evidence.*—*General.*—Objections to evidence offered that it is "incompetent, immaterial and irrelevant" are too general to present any question when such objections are overruled.

DEMURRER.—*Special.*—Special demurrers are not allowed by the civil code, and can not be resorted to.

SLANDER.—*Defendant, Laying Foundation for Impeachment of.*—*Slandorous Words Spoken at Other Times and Places.*—In an action in slander, where the defendant as a witness in his own behalf denies speaking the slanderous words charged, it is not competent, in rebuttal, for the purpose of impeaching him, to show that he did speak the words charged at other times and places, even though he denied on cross-examination that he had spoken them at such times and places.

NEW TRIAL.—*Newly Discovered Evidence.*—A motion for a new trial because of newly-discovered evidence may be overruled if it is not shown that diligence was used to procure it before the trial.

ARGUMENT OF COUNSEL.—*Misconduct of Counsel.*—*Curing Error.*—Generally, if counsel use improper language in argument to the jury, the error may be cured, on objection, by instructing the jury to disregard and not consider it.

From the Huntington Circuit Court.

B. F. Ibach, B. M. Cobb and C. W. Watkins, for appellant.

M. L. Spencer, for appellee.

MILLER, J.—The appellant brought an action of slander against the appellee, the slanderous words consisting of a charge that the appellant had forged certain instruments, and

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expressing an opinion that he ought to be in the penitentiary.

To this complaint the defendant answered by a general denial, and also by an affirmative answer, in which the plaintiff was charged with having mistreated and abandoned his wife, and thereby lost the respect of his neighbors, closing with a denial of all other allegations in the complaint. The plaintiff moved the court to strike out parts of this pleading, and his motion was overruled.

This paragraph was neither in mitigation nor justification of the slander charged in the complaint, and the court should have sustained the motion of the plaintiff, and eliminated the record of a pleading that was an aggravation rather than mitigation of the charge contained in the complaint. It is a part of the duty of *nisi prius* courts to frown upon and discourage the filing of nondescript pleadings such as this one, but it does not follow that we should reverse a judgment on account of the failure of the court to sustain such a motion. That we can not reverse on account of the erroneous ruling of a court in overruling such motion is well settled. *McLean v. Equitable Life, etc., Society*, 100 Ind. 127 (137); *Rowe v. Major*, 92 Ind. 206.

A motion to compel the defendant to separate this paragraph of answer into two paragraphs was made and overruled. The court did not err in overruling this motion. The pleading was not double, but attempted to set up a plea of confession and avoidance of a part of the complaint and a denial of the residue. *State, ex rel., v. Newlin*, 69 Ind. 108.

A demurrer to all of the answer except that portion which contained a denial was filed and overruled. Special demurrers are not provided for in our code of practice. *Estep v. Estep*, 23 Ind. 114; *Mathews v. Norman*, 42 Ind. 176.

The sufficiency of the pleading as a whole was not tested on demurrer, and we are, therefore, not required to pass upon that question.

During the course of the trial a witness was asked if he

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was acquainted with the character, standing and reputation of the plaintiff in July, 1885, among the parishioners of his church and in the community where he then resided? The witness, having answered in the affirmative, was then asked "whether that reputation, character and standing was good or bad;" to which he answered that it was bad.

The record informs us that the plaintiff objected to the same, for the reason that the question and answer thereto were "incompetent, irrelevant and immaterial," and that the court overruled the objection.

This ruling of the court is complained of and relied upon to reverse the judgment rendered against the appellant.

Under the well-established and uniform rule of practice, that objection to the admission of evidence must be reasonably specific, and that the objection that the evidence is "incompetent, immaterial and irrelevant" is not sufficiently specific to present the question of its admissibility for review in this court, we must decline to examine this ruling. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; *Metzger v. Franklin Bank*, 119 Ind. 359; *Litten v. Wright School Tp.* 127 Ind. 81.

Other evidence of a similar character was admitted during the course of the trial, but, as the objections to its admission were uniformly the same as above quoted, we need not consider them separately.

The defendant, during the course of his examination, denied the speaking of the slanderous words, and in cross-examination was asked if he did not make similar statements to another witness at another time and place. This he also denied. On rebuttal, the plaintiff offered to prove, for the purpose of contradiction, that the defendant did make such declaration, but the court excluded the evidence.

This evidence, if offered as a part of the plaintiff's original case, would have been admissible to prove malice. *Meyer v. Bohlfig*, 44 Ind. 238; *Newell Defamation, etc.*, 349.

It was, however, not competent in cross-examination to

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ask the witness if he had not made similar statements to other witnesses at other times and places, for the purpose of rendering it probable that he spoke the words proven by the plaintiff in his evidence in chief. 1 Greenl. Ev., sections 52-53; *Strong v. State*, 86 Ind. 208.

The answer given by the defendant on cross-examination, in which he denied making the statements to the witness, being immaterial, could not be the foundation of an impeachment.

Objections are urged to the admission of some other evidence, but we think, on examination, that the objections to its admission were not sufficiently specific to authorize us to review the rulings of the court.

The cause for a new trial dependent upon newly-discovered evidence fails to show any diligence whatever on the part of the plaintiff to procure the evidence before the trial, is cumulative, and wholly insufficient upon any view of the case to authorize us to disturb the judgment. See *Morrison v. Carey*, 129 Ind. 277. The remaining cause for a new trial is the alleged misconduct of one of the attorneys for the defendant in making certain statements outside the evidence and legitimate issues, in his address to the jury. The record shows that, upon objection being made, the court admonished the counsel to confine his argument to the evidence, and, upon his protesting that he was confining himself to the evidence, the court immediately said to the jury:

"Gentlemen, no statement made by counsel as to treatment by plaintiff of his wife, nor the statement of counsel as to any fact within his own knowledge, or what everybody else knows, should be regarded or considered by you at all. You must try this case, so far as the facts are involved, upon the evidence, and not such statement of counsel."

¶ This charge was pertinent to the objectionable statements of counsel, and we think that, the court having acted promptly in directing the minds of the jury to the proper rule to be observed by them, we should presume that the harmful re-

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marks of counsel were fully counteracted. We do not, however, hold that there may not be cases where we should feel called upon to reverse a judgment, although the court may have acted promptly to charge the jury to disregard the objectionable statements.

We find no available error in the record for which we should reverse this cause.

Judgment affirmed.

Filed Oct. 10, 1891; petition for a rehearing overruled Feb. 27, 1892.

130	538
131	228
130	538
149	605
130	538
159	592

 No. 15,266.

BRANCH v. FOUST ET AL.

SHERIFF'S SALE.—*Ejectment.*—*Attacking Validity of Sale.*—*Attack by Cross-Complaint is not a Collateral Attack.*—Objections to a sheriff's sale may be made in an action to recover possession of land thereunder; and an attack upon the validity of such sale by way of cross-complaint is a direct and not a collateral attack.

SAME.—*Purchaser.*—*Notice to of Irregularities.*—A purchaser who is a party to the judgment is chargeable with notice of all irregularities in the sale.

SAME.—*Inadequacy of Price.*—Mere inadequacy of price alone is not sufficient to justify setting aside a sale of land, unless the difference between the value of the land and the price paid is so great as to shock the sense of justice and right.

SAME.—If, coupled with great inadequacy of price, there are circumstances showing fraud, irregularity or great unfairness, a court of equity will not hesitate to set a sale aside, especially where a direct attack is made upon it.

From the Madison Circuit Court.

R. Lake, M. S. Robinson, J. W. Lovett and S. M. Keltner,
for appellant.

C. L. Henry and H. C. Ryan, for appellees.

MCBRIDE, J.—This was a suit by the appellant to recover the possession of certain land in Madison county.

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The complaint was in two paragraphs. The first was in the ordinary form for the recovery of real property. The second was based upon a title derived through a sheriff's sale, and recited the recovery of a judgment by the appellant and another against the appellees, with all the necessary intervening steps up to and including the execution of a deed to the appellant by the sheriff.

The appellees answered by a general denial. Louisa Foust also filed a cross-complaint, which, in substance, alleges that she is, and for more than ten years has been, the owner in fee simple of the land in controversy; that on the 18th day of November, 1878, the appellant and one Charles E. Diven recovered a judgment before a justice of the peace against the appellee and her co-defendant for \$91.25 and costs; that on the 5th day of May, 1886, a transcript of the judgment was filed in the clerk's office of the Madison Circuit Court; that on the 17th day of November, 1886, an execution was issued thereon by the clerk of said court, and placed in the hands of the sheriff of that county, who levied the same on said land, and advertised it for sale on the 19th day of February, 1887; that the land was by the sheriff sold on that day, the appellant being the purchaser, for the sum of \$167.03; that the sheriff executed to the purchaser a certificate, and on the — day of —, 1888, executed to him a deed.

It is further averred that at the date of said sale the land was worth \$4,000, and that prior to said levy and sale the sheriff made no demand upon Charles Foust, her co-defendant in said judgment, for property out of which to satisfy said judgment, although he had at the time in said county personal property subject to levy and sale worth more than \$500. It is also averred that the cross-complainant had no knowledge of the sale of her said land until after the year for redemption had expired, and that the bringing of the suit for possession was the first notice or knowledge she had that her land had been sold. Also, that at the time of the

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sale she had and held a judgment in the Madison Circuit Court against the appellant for \$245 and costs, being more than the entire amount of the judgment of the appellant upon which the sale was made.

It is also averred that the land sold was so situated that it could have been divided into tracts of five or ten-acre pieces, without injury, any five acres of which would have been sufficient to have fully paid said debt.

The cross-complaint also shows that on the 5th day of September, 1888, and within sixty days after the cross-complainant learned of the sale, she tendered to appellant the full amount of her bid on said land, with 8 per cent. interest to the date of the tender, but the tender was refused; that such tender has since been kept good, and concludes with a demand that the sale be set aside, and for a decree permitting her to redeem.

A demurrer to the cross-complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was overruled, and the appellant assigns this ruling as error.

The jury returned a special verdict, finding in substance the following facts:

The appellee Louisa Foust became the owner in fee simple of the land in controversy September 24th, 1873. The appellant and Charles E. Diven recovered a judgment against her and Charlest Foust on the 18th day of November, 1878, before a justice of the peace for \$91.20, with 10 per cent. interest and \$3.35 costs. An execution was issued November 30th, 1878, and returned January 13th, 1879, by the constable *nulla bona*.

May 6th, 1881, the justice prepared a transcript, which was filed and recorded in the clerk's office of Madison county May 5th, 1886. November 17th, 1886, an execution on the judgment was issued by the clerk of Madison county to the sheriff of that county. The sheriff demanded payment of the appellee Louisa, and also demanded personal property

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of her, both of which were refused, but he made no demand whatever upon her co-judgment defendant, Charles, although said Charles then owned and had upon the premises in controversy personal property, subject to the levy of said writ, worth more than \$600. December 7th, 1886, the sheriff levied the execution upon the land, and, having duly advertised it, he sold it on the 19th day of February, 1887, to the appellant for \$167.03, which was the exact amount then due on the writ. The jury find that the sheriff offered the rents and profits of the land in parcels, and, receiving no bids, he offered the fee simple in parcels, and, receiving no bids, he offered the fee simple of all. They do not find whether or not he offered the rents and profits of all, but the finding relative to the manner of offering and selling is against the appellee. The finding is full, showing the execution of a sheriff's certificate, the failure to redeem, and the execution of a sheriff's deed.

The jury also finds that the land was of the value of \$3,200 at the time of the sale, and that its annual rental value was, and for five or six years thereafter had been, \$240; that at the time the appellee was, and still is, in possession of the land, and that she had no actual knowledge or information of the levy of said execution on said land, or that it had been advertised or sold, until this suit was commenced and summons served upon her. They also find that the land was so situated that it could, without injury, have been subdivided and sold in four parcels, each worth \$800. The finding also fully sustains the averment of the cross-complaint of the offer to redeem and tender of the money to the appellant, and that the tender had been kept good. It is also found that on the 2d day of July, 1886, the appellee Louisa recovered a judgment against the appellant for \$245.40 in the Madison Circuit Court which was unsatisfied and unpaid at the date of the sale, and that on the 18th day of January, 1889, on a settlement being had between the appellant and said Louisa, which included the judgment last above referred

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to, but did not include anything involved in this suit, it was found and agreed that the appellant owed her a balance of \$184.61.

The appellant insists that he was entitled to a judgment in his favor on the special verdict, and assigns as error the action of the circuit court in rendering judgment in favor of the appellee.

The questions presented by the two assignments of error will be considered together.

Appellant's contention is :

1st. In an action for the possession of land by one whose title is derived through a sheriff's sale, the validity of the sale can not be attacked by cross-complaint.

2d. No fact is averred or found sufficient to render the sale void, and it is insisted that the attack thus made on the sheriff's sale is collateral, and can not succeed because of irregularities which might render the sale voidable, but do not render it void.

3d. No substantial objection is shown to the sale, save inadequacy of consideration, and that a sheriff's sale will never be set aside for mere inadequacy of consideration.

It is well settled that objections to a sheriff's sale may be made in an action to recover the land. *Sherry v. Nick of the Woods*, 1 Ind. 575; *Meredith v. Chancey*, 59 Ind. 466 (469).

We know of no good reason why the attack may not be made by way of cross-complaint. We think it may. Counsel err in assuming that the attack thus made upon the sale is collateral. It is as much a direct attack as if, without any suit by the appellant to recover the land, the appellee had commenced a suit to set the sheriff's sale aside. When the defendant in an action files a proper cross-complaint, he thereby commences an action in which he is the plaintiff. It is so far an independent action that the dismissal by the plaintiff of the main action does not necessarily affect it.

As is said in *Ewing v. Patterson*, 35 Ind. 326 (330): "The

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only real difference between a complaint and a cross-complaint is, that the first is filed by the plaintiff and the second by the defendant. * * * When a defendant files a cross-complaint and seeks affirmative relief, he becomes the plaintiff, and the plaintiff in the original action becomes the defendant in the cross-complaint."

It is true that, in so far as the question is raised by way of answer, the attack upon the sale is collateral. But it must be remembered that the purchaser at the sale was the execution plaintiff, who is also the party here seeking to enforce it.

While we feel that we are not required to decide the question here, we do not wish to be understood as affirming or intimating that a sheriff's sale may not be attacked collaterally where, as in the case at bar, the purchaser is the execution plaintiff. The authorities are uniform in holding that he is chargeable with notice of all irregularities in the sale. *Meredith v. Chancey*, *supra*; *Harrison v. Doe*, 2 Blackf. 1; *Hamilton v. Burch*, 28 Ind. 233 (235); *Piel v. Brayer*, 30 Ind. 332 (339); *Keen v. Preston*, 24 Ind. 395 (398); *Carnahan v. Yerkes*, 87 Ind. 62; *Richey v. Merritt*, 108 Ind. 347.

But as every question involved is properly raised under the issues formed on the cross-complaint, we need not and do not decide any question except such as arises in the direct attack thus made by the cross-complaint.

Counsel also err in assuming that a sheriff's sale will never be set aside because of inadequacy of consideration.

Mere inadequacy of price alone may be sufficient to justify setting the sale aside. To have this effect, however, the disparity between the value of the property sold, and the price paid, must be so great as to shock the sense of justice and right. *Chamblee v. Tarbox*, 27 Texas, 139 (84 Am. Dec. 614); *Wright v. Dick*, 116 Ind. 538; *Fletcher v. McGill*, 110 Ind. 395.

If, coupled with great inadequacy of price, there are circumstances showing fraud, irregularity or great unfairness,

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the courts will not hesitate (at least when the attack upon the sale is direct) to set it aside. See, in addition to cases above cited, *Reed v. Carter*, 1 Blackf. 410; *Reed v. Carter*, 3 Blackf. 376; *Lashley v. Cassell*, 23 Ind. 600 (602), and also cases cited in *Wright v. Dick*, *supra*, and *Fletcher v. McGill*, *supra*.

In *Wright v. Dick*, *supra*, it is said, page 542, that the authorities universally agree "that gross inadequacy of price, coupled with slight additional facts, showing fraud, irregularity, or any other circumstance, which may have operated to prevent the property from bringing something like its fair value, will avoid a sale."

In *Graffam v. Burgess* 117 U. S. 180 (192), the court says: "Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud." See, also, authorities cited in *Wright v. Dick*, *supra*, and *Fletcher v. McGill*, *supra*.

The facts in *Wright v. Dick*, *supra*, were in many respects not unlike the facts in the case at bar, and, as here, the attack upon the sheriff's sale was by way of cross-complaint, in an action for partition.

In the case at bar the following facts are shown beyond controversy:

The judgment recovered against the appellee and another was allowed to rest for years without effort to enforce it. Then, although the appellant was at the time indebted to the appellee in a sum larger than the amount due on the judgment, he caused an execution to issue for its collection. While a demand was made upon her for payment, or for personal property on the writ, no demand was made upon her co-judgment defendant who had at the time, on the very land which was sold, personal property, subject to execution, worth more than \$600, and was only entitled to \$300 of it exempt from execution as against this judgment. Without her knowledge the execution was levied upon her land, which the jury finds was worth \$3,200. It was sold by the

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sheriff and bid in by the appellant for \$167.03. She had no actual knowledge of the sale until after the year for redemtion had expired. To sustain the appellant's contention would be to adjudge that by this sale he has acquired title to the land and may evict her. This we can not do. In our opinion the judgment of the circuit court was clearly right. We do not decide whether the inadequacy of price was or was not alone sufficient to avoid the sale. The additional facts are sufficient not only to justify, but to compel the inference that the appellant in pursuing the course he did was not actuated by a mere desire to collect the debt due him.

Judgment affirmed.

Filed March 9, 1892.

No. 15,542.

CHAMP ET AL. v. KENDRICK, TRUSTEE.

APPEAL.—Final Judgment.—In an action to quiet title, where all the defendants demurred to the complaint, but one, who filed a cross-complaint, and judgment was rendered against the demurrants, and the cause continued on the cross-complaint, the judgment was not final, and can not be appealed from.

SAME.—Jurisdiction.—Where the judgment appealed from is not a final judgment, the consent of the parties will not give the Supreme Court jurisdiction.

From the Fulton Circuit Court.

S. Keith, for appellants.

E. Myers, G. W. Holman and R. C. Stephenson, for appellee.

MILLER, J.—This was an action to quiet the title to real estate brought by the appellee against the appellants and Milton Shirk.

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The defendants, other than Shirk, demurred to the complaint. Their demurrers were overruled, and final judgment rendered against them on demurrer, quieting the title of the real estate described in the complaint.

This appeal was brought to reverse this judgment.

The finding of the court is, that the plaintiff "have judgment against the defendants, other than the defendant Milton Shirk, and this cause is continued on defendant Shirk's cross-complaint."

The judgment rendered upon this finding concludes with this statement: "And this cause is continued on cross-complaint of defendant Milton Shirk."

Appeals, except in a few specified instances, will only lie to this court from final judgments. Section 632, R. S. 1881.

A judgment is not final unless all the issues of law and fact are determined, and the case completely disposed of, so far as the court had power to dispose of it. *Western Union Tel. Co. v. Locke*, 107 Ind. 9..

In that case this language from Freeman on Judgments is quoted with approval.

"The policy of the laws of the several States and of the United States, is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal."

There is no final judgment in favor of the plaintiff where one of the defendants is not mentioned in the judgment. A judgment to be final must dispose of the case as to all of the parties, and finally dispose of the subject-matter of the litigation. *Masterson v. Williams* (Texas), 11 S. W. R. 531; *Mignon v. Brinson*, 74 Tex. 18; *Schultz v. McLean*, 76 Cal. 608; *Watkins v. Mason*, 11 Ore. 72; *State, ex rel., v. Templin*, 122 Ind. 235.

If the judgment is not final, this court is without jurisdiction. *Wingo v. State*, 99 Ind. 343; *Mignon v. Brinson*, *supra*.

Even the consent of parties can not give this court jurisdiction where the judgment appealed from is not a final

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judgment. *Shroyer v. Lawrence*, 9 Ind. 322; *Davis v. Davis*, 36 Ind. 160; *Wingo v. State*, *supra*; *Western Union Tel. Co. v. Locke*, *supra*.

Appeal dismissed.

Filed March 10, 1892.

No. 15,617.

STEELE v. MCCARTY.

130	547
143	70
130	547
150	416

EXECUTION.—*Sale of Judgment.*—*Action to Set Aside.*—*Sufficiency of Complaint.*—In an action to set aside the sale of a judgment on execution, a complaint alleging that the plaintiff did not give up the judgment to be levied on is sufficient under section 724, R. S. 1881, which provides that choses in action may be levied upon when given up.

SAME—*Sufficiency of Answer.*—An answer to such complaint, confessing that the plaintiff did not give up the judgment for levy and sale, and failing to allege any matter sufficient to avoid such confession, is bad on demurrer.

From the Clinton Circuit Court.

S. O. Bayless, *C. G. Guenther* and *J. V. Kent*, for appellant.
T. H. Palmer and *W. F. Palmer*, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant to set aside the sale of a judgment made on execution by the sheriff of Clinton county.

It is alleged in the complaint, among other things, that at the time of the sale the judgment amounted to three hundred and fifty dollars, and that the same was amply secured by a mortgage upon real estate; that said judgment was struck off and sold to the appellant, who was the attorney of the execution plaintiff, for the sum of two dollars. The complaint also alleges that the appellee did not give up said judgment to be levied upon, and had no notice of the time or place of such sale until after it was made.

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The sufficiency of the complaint is tested for the first time in this court by an assignment of error.

We think the complaint, when tested in this manner, is sufficient.

The judgment named in the complaint was not subject to levy and sale on an ordinary execution, unless given up by the appellee for that purpose, and unless so given up the levy and sale were void. *Johnson v. Crawford*, 6 Blackf. 377; *Marion T. P., etc., Co. v. Norris*, 37 Ind. 424.

The answer professes to be a plea by way of confession and avoidance, but it amounts to nothing more than an argumentative denial of the matters alleged in the complaint.

It admits that the appellee did not give up the judgment for levy and sale, but avers that it was levied upon by her direction and with her consent. A square denial of the allegations of the complaint upon this subject would have put at issue the vital question in the case. Section 724, R. S. 1881, provides that "Any debt or thing in action, legally or equitably assignable, may be levied upon, when given up by the defendant, and sold on execution, in the same manner as other personal property."

There are many matters alleged in the complaint, and many averments contained in the answer, which have no bearing upon the vital question in the case, and can not be considered.

Every pleading must proceed upon some single, definite theory, and must be good upon that theory if good at all. The complaint proceeds upon the theory that the sale of the judgment in question by the sheriff was void, because it had not been given up by appellee. The answer confessing that she did not give it up for levy and sale on the execution held by the sheriff, and failing to aver any matter sufficient to avoid such confession, was bad, and the court did not err in sustaining a demurrer thereto.

There is no error in the record, and the judgment of the circuit court is therefore affirmed.

Filed Feb. 27, 1892.

Champ et al v. Kendrick, Trustee.

No. 15,543.

CHAMP ET AL. v. KENDRICK, TRUSTEE.

PRACTICE.—*Pendency of Another Action.*—*How Raised.*—*Motion to Dismiss.*—

Plea in Abatement.—It is proper to overrule a motion made by a guardian *ad litem* to dismiss an action for the reason "that there is now pending in this court another action in which it is sought to have settled the only question which can be adjudicated in this cause." The matter sought to be raised by the motion must be plead in an answer of abatement, duly verified.

AFFIDAVIT.—*Sworn to Upon Belief.*—An affidavit sworn to upon the belief of a party is equivalent to swearing that it is true.

PLEADING.—*Want of Verification.*—*Demurrer.*—*Motion to Reject.*—Want of verification of a pleading can not be raised by a demurrer, but must be taken advantage of by a motion to reject for want of verification.

INJUNCTION.—*Verification of Complaint.*—*When not Required.*—Where the only relief prayed for is an injunction upon the final hearing, a verification of the complaint is not required. Where the appeal is from the final judgment, and not from an interlocutory order granting a temporary injunction, it is wholly immaterial whether the complaint was verified or not.

SAME.—*Will.*—*Devise of Lands.*—*Sale of Lands by Devisee without Right.*—

Trustee May Enjoin Purchaser.—Certain lands were devised to a party for and during his natural life, upon the express condition that the devisee should not sell or dispose of his interest in the lands by a sale in gross, or hold and enjoy the same in any other manner than by renting out the same from year to year and receiving the rents. The will also provided that after closing up the trust and making settlement with the court, the executor should not be finally discharged, but should act as trustee upon the failure of the devisee to keep the taxes upon the lands devised to him fully and promptly paid, or if he should attempt to sell the same in gross.

Held, that the trustee might maintain an action to restrain the defendant to whom it was alleged the devisee sold said lands in gross from taking possession of the same, the insolvency of said defendant being alleged, and it being shown that the lands had been sold for taxes, and that they had not been redeemed from the sale, and that the trustee had in his hands no means of said trust with which to pay the taxes, and no way of acquiring such means except by renting out the lands as provided in said will.

ACTION.—*Survival of.*—*Death of Defendant.*—*Substitution of Heirs.*—*Complaint*

Applies to Them.—Where in a cause of action which survives, heirs are substituted as defendants upon the death of their ancestors, they stand

130	549
135	110
130	549
143	356
130	549
147	572
130	549
148	88
148	89
130	549
160	81
160	332
160	336

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in precisely the same relation to the plaintiffs that the original defendants did, and the allegations of the complaint apply to them as if they were original defendants.

From the Fulton Circuit Court.

S. Keith, for appellants.

G. W. Holman, *R. C. Stephenson* and *E. Myers*, for appellee.

MILLER, J.—By his last will and testament Joel Townsend devised to Joel R. Townsend certain real estate, for and during his natural life.

The life-estate was given upon the express condition that the devisee should not sell or dispose of his interest in the land by a sale *in gross*, or hold and enjoy the same in any other manner than by renting the same out from year to year and receiving the rents.

The will directed that his executor, after closing up the trust and making settlement with the court, should not be finally discharged, but should continue to act as a trustee upon the contingency that if Joel R. should, at any time, fail to keep the taxes upon the lands devised to him fully and promptly paid, or should attempt to sell the same *in gross*, contrary to the conditions of the devise, then, or in either case, the trustee should take possession of the lands advertised as delinquent, or attempted to be sold, and rent the same out upon the best terms he could obtain, and, after paying such delinquent taxes, needed repairs and expenses, turn over the residue to the devisee.

It was further provided that the devisee might at any time be reinstated in his original condition, by refunding to such trustee the money expended for taxes and other expenses incident to such delinquency.

This action was instituted by the appellee, as trustee, against one Joseph Champ. The complaint alleged that the plaintiff had been appointed by the Fulton Circuit Court as trustee under the will of Joel Townsend, and that he had

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qualified and was acting as such trustee ; that said Joel R. Townsend, contrary to the terms of the will of Joel Townsend, had sold *in gross* and attempted to convey the land devised to him ; that he also failed to keep the taxes on the land fully and promptly paid, but, on the contrary, had permitted the land to be sold for taxes in February, 1885 ; that the lands had not been redeemed from the sale, and that the plaintiff has in his hands no means of said trust with which to pay the taxes, and no way of acquiring such means, except by renting out the land as provided in said will ; that the land is in the possession of one Jacob Stanton, who holds under a lease which will expire on the 10th day of March, 1886, at which time he will vacate the premises ; that the defendant has moved a load of corn and some other goods on said land, and says that he will move to and take possession of the farm as soon as it is vacated by the tenant in possession.

The complaint avers that the defendant is wholly insolvent, worthless and unscrupulous ; that if he gets possession it will be impossible for the plaintiff to discharge his duty under the will of Joel Townsend in carrying out its provisions ; that said Champ, being worthless, he could recover nothing from him in the way of damages, and that if he is permitted to go into possession of said land great and irreparable injury and damage to the interests will be incurred.

The prayer for relief is for a restraining order prohibiting the defendant from taking possession of the land, or in any way interfering with the trust, and that upon final hearing the injunction be made perpetual.

During the pendency of the action the defendant Joseph Champ died, and the appellants, who are his children and heirs, were substituted as defendants.

The defendants being minors, a guardian *ad litem* was appointed for them.

A motion was made by the guardian *ad litem* to dismiss the action for the reason, as alleged in the motion, "that

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there is now pending in this court another action (No. 3875), in which it is sought to have settled the only question which can be adjudicated in this cause."

This motion the court very properly overruled. The matter sought to be raised by the motion must be plead in an answer of abatement, duly verified. 1 Works Pr. and Pl., sections 563, 562.

The guardian *ad litem* demurred to the complaint; his demurrer was overruled, and refusing to answer further, final judgment was rendered in favor of the plaintiff making the injunction perpetual.

The sufficiency of the complaint is the only remaining question before us for decision.

The appellant insists that the complaint is bad for want of sufficient verification, the affidavit stating that "the matters and things set forth in the foregoing complaint are true, as he is informed and believes."

This verification was good. An affidavit sworn to upon the belief of a party is equivalent to swearing that it is true. *Archibald v. Lamb*, 9 Ind. 544; *State v. Ellison*, 14 Ind. 380; *McNamara v. Ellis*, 14 Ind. 516; *Curry v. Baker*, 31 Ind. 151; *Bonsell v. Bonsell*, 41 Ind. 476; *Thayer v. Burger*, 100 Ind. 262.

It was only necessary to have the complaint verified, because a restraining order was asked and granted. Where the only relief prayed for is an injunction upon the final hearing a verification of the complaint is not required. This appeal being from the final judgment, and not from an interlocutory order granting a temporary injunction, it is wholly immaterial whether the complaint was verified or not. *Sand Creek T. P. Co. v. Robbins*, 41 Ind. 79.

Want of verification of a pleading can not be raised by a demurrer, but must be taken advantage of by a motion to reject for want of verification. *Pudney v. Burkhart*, 62 Ind. 179; *Indianapolis, etc., R. W. Co. v. Summers*, 28 Ind. 521;

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Harrison v. Lockhart, 25 Ind. 112 ; *Bradley v. Bank, etc.*, 20 Ind. 528.

The contention of the appellant that a court of equity will not, under the circumstances stated in the complaint, enjoin that which, if consummated, would amount to nothing more than a simple trespass, presents a question of more difficulty.

The law undoubtedly is as stated in 3 Pom. Eq. Jur., section 1357.

"If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere."

A tendency may, however, be noted, particularly in States where, as in our own, the distinction in pleading and practice in actions at law and suits in equity has been abolished, and all courts are courts of law and equity, to look with favor upon the doctrine laid down in a subsequent portion of the section of Pom. Eq. Jur. above cited :

"That a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess."

It is not necessary, under our code of practice, to aver or prove that the plaintiff will suffer irreparable injury if the relief by injunction is not granted. All that is necessary is to aver and prove that the plaintiff will suffer *great* injury. Section 1148, R. S. 1881 ; *Erwin v. Fulk*, 94 Ind. 235.

In *Bishop v. Moorman*, 98 Ind. 1, this court quoted with approval from the opinion in *Watson v. Sutherland*, 5 Wall. 74, the following language :

"It is not enough that there is a remedy at law ; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."

We are satisfied that the complaint in this case, while it bears marks of haste in its preparation, states facts that are sufficient to entitle the plaintiff to relief.

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The property had been sold for taxes, and it could only be redeemed by renting it out, as directed by the will, and applying the rents to its redemption. This was necessary to preserve the estate, not only for the use of the life tenant, but for the remainder man as well.

In addition to this, it is stated that the defendant was insolvent, so that nothing could be recovered from him in the way of damages.

In High on Injunctions, section 717, it is said :

"Insolvency of the trespasser affords additional ground for the interference, since his inability to respond in damages renders the remedy at law ineffectual." *McQuarrie v. Hildebrand*, 23 Ind. 122.

The appellants contend that the amended complaint entirely fails to show any cause of action against the appellants; that the original complaint charges that Joseph Champ was threatening to commit a trespass, but that the amended complaint makes no charge against his children, who are substituted in his place as defendants to the action.

Where, in a cause of action which survives, heirs are substituted as defendants upon the death of their ancestors, they stand in precisely the same relation to the plaintiff that the original defendants did, and the allegations of the complaint apply to them as if they were original defendants.

The appellants indulge in some criticism of the language used in the prayer for relief; but we are satisfied that it was sufficient to give the court to understand that the plaintiff asked for a temporary restraining order, and that upon final hearing he be granted a perpetual injunction. The court below so understood the prayer, and granted this relief.

We find no error in the record.

Judgment affirmed.

Filed March 8, 1892.

Martin v. Motsinger.

No. 16,054.

MARTIN v. MOTSINGER.

130	555
147	179
130	555
164	537

PRACTICE.—*Alleged Errors.*—*How Brought Into Record.*—*Motion for New Trial.*—Alleged error in empanelling a jury and in forcing a cause to trial in the appellant's absence, and without notice to her, and in refusing to her time to consult counsel and prepare for trial, must in order to be considered by the Supreme Court be brought into the record by the motion for a new trial, as errors of law occurring at the trial.

INSANITY.—*Proceeding to Establish.*—*Circuit Court Has Exclusive Jurisdiction.*—The circuit court has exclusive jurisdiction in a proceeding under the statute to have a person adjudged of unsound mind, and incapable of managing her estate, and for the appointment of a guardian of her person and estate.

SAME.—*Notice to Party Unnecessary.*—*Must be Appearance for.*—*What Constitutes a Valid Appearance.*—*Prosecuting Attorney.*—In such a proceeding the statute does not, in terms, require notice to the party alleged to be of unsound mind, and the proceeding may be regular and valid without the service of any notice upon the party. The proceeding, however, is of such a character that it can not be *ex parte* and be valid. The prosecuting attorney is not authorized by our statutes to represent the party whose soundness of mind is questioned. An appearance by attorney, however, is sufficient, it not being claimed that such appearance was unauthorized. The party can not claim that she was incompetent to employ counsel, because her standing on appeal depends upon the assertion of her mental capacity and ability to transact business. Even if their appearance for her in the circuit court had been unauthorized, it would be binding upon her until set aside.

From the Washington Circuit Court.

D. M. Alsbaugh, J. C. Lawler and C. L. Jewett, for appellant.

S. H. Mitchell and R. B. Mitchell, for appellee.

MCBRIDE, J.—This was a proceeding under the statute to have the appellant adjudged a person of unsound mind, and incapable of managing her estate, and for the appointment of a guardian of her person and estate. No notice was issued or served upon her of the pendency of the proceeding, and she was not present in court at any time. The statement was filed December 2d, 1890, and on the 15th day of December,

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1890, the clerk filed an answer in proper form, as required by statute. On the same day the cause was called for trial, whereupon the attorneys who represent the appellant in this court appeared in her behalf, and with them also appeared the prosecuting attorney by his deputy. They objected to proceeding in the cause, for the reason that she had not been personally notified of the proceeding, or served with process, and had had no time for consultation with her attorneys. The court withheld its ruling upon the objection, and caused a jury to be empanelled and sworn to try the cause, and then required the petitioner to submit proof showing why the appellant was not produced in court. To this end witnesses were called and examined, and the court, upon their testimony, found that she could not be produced in court by reason of physical infirmities and extreme old age. The objection to proceeding was overruled, and duly excepted to, and the trial proceeded.

The jury found that she was of unsound mind, and incapable of managing her estate. A motion for a new trial was overruled, and the court rendered judgment on the verdict, and appointed a guardian.

The errors assigned are :

1st. Empanelling a jury to try the cause over the objection made by appellant's counsel.

2d. Forcing the cause to trial in appellant's absence, and without notice to her, and in refusing to her time to consult counsel and prepare for trial.

3d. Overruling motion for a new trial.

4th. The court had no jurisdiction of the person of the appellant.

5th. The court had no jurisdiction over the subject-matter of the proceeding.

The first and second errors are not well assigned. If the court erred, as indicated, the question should have been brought into the record by the motion for a new trial, as errors of law occurring at the trial, etc.

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It is due to the lower court that errors of the character alleged be pointed out there, and opportunity be given it to correct its own errors. *State, ex rel., v. Swartz*, 9 Ind. 221.

The fifth alleged error may be disposed of with brief mention. The subject-matter of the proceeding was the question of the appellant's mental unsoundness, and her capacity to manage her estate. Of cases of this character the circuit court has exclusive jurisdiction. Jurisdiction of the subject-matter does not mean jurisdiction of the given case, but of the class of cases to which it belongs.

The court plainly had jurisdiction of the subject-matter of the proceeding.

Had the court jurisdiction of the person of the appellant and of the case? Jurisdictional questions thus raised must be determined from the face of the record. Works Pr. and Pl., section 1085.

The appellant insists that jurisdiction of her person could only be acquired by notice, and the record, showing affirmatively that there was no notice, affirmatively shows want of jurisdiction. The statute providing for proceedings of this character does not, in terms, require notice, and the proceedings may be regular, and valid, without the service of any notice upon the party. *Hutts v. Hutts*, 62 Ind. 214; *Nyce Hamilton*, 90 Ind. 417.

The statute provides that when a sufficient statement has been filed relating to an inhabitant of the county, the court "shall cause such person to be produced in court." Section 2545, R. S. 1881. It is, however, provided by section 2547, R. S. 1881, that, "If the court shall be satisfied that such person, alleged to be of unsound mind, can not without injury to his health, be produced in court, such personal appearance may be dispensed with." Of the requirement for the production of the party in court, this court, in the case of *Fiscus v. Turner*, 125 Ind. 46, said: "We think the object sought to be attained by the enactment of this section was the prevention of frauds in procuring verdicts and judgments of in-

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sanity without an actual opportunity to the defendant of being heard. For this reason the law requires that the party charged with being insane shall, if possible, be produced in open court in order that he may hear and have actual knowledge of what is being done, and may meet the witnesses face to face. As the party charged in such a case may be deprived of his property and of his liberty, it was doubtless thought by the Legislature that it was as important that he should be actually present as it would be if he were charged with a criminal offence."

Being present, it is immaterial whether he was or was not served with notice, or was produced by order of the court, or by the party filing the statement, or appeared voluntarily, as in either event he would have the same opportunity to defend and protect his rights. *Nyce v. Hamilton, supra*. The service of notice could have accomplished no more.

But, while this is true, and while there may be a valid inquest and judgment in such cases without notice, when the party is present, it is otherwise when he is not present and is not represented by some one authorized to appear for him. While the statute does not in terms provide for notice, the proceedings are of such a character that they can not be *ex parte* and be valid. If the statute was to be construed as authorizing proceedings of an *ex parte* character, it would be, to that extent, in conflict with the Constitution of the United States, and void.

The proceeding, if successful, results in the deprivation of both liberty and property. The guardian, when appointed, is guardian of both person and estate, and, under the Constitution, no man can be deprived of either liberty or property without due process of law. He is entitled to his day in court.

When he is actually brought in, or voluntarily appears, he has the right guaranteed him by the Constitution. If, however, he is not brought in, and the court, after an *ex parte* hearing, and without notice to him of any character, and

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without his knowledge, proceeds to hear and determine the matter, it can not be said that he has had his day in court. When such a fact is disclosed by appeal, and not by way of collateral attack on the proceedings, they can not stand. In the case at bar the appellant was not present, and no notice to her was issued or served. How was she affected, if at all, by the action of the attorneys who assumed to represent her, or the deputy prosecuting attorney who, in his official capacity, assumed the right to appear in her behalf?

So far as the prosecuting attorney is concerned, we know of no statute making it his duty to appear in such cases, or authorizing his appearance. Section 5864, R. S. 1881, prescribing the duties of the prosecuting attorney, provides that he shall "protect the interests of all persons of unsound mind."

This would doubtless make it his duty to protect the interests of a person after he had been adjudged of unsound mind, and, possibly, in a proper case, of one in fact of unsound mind where there had been no adjudication of mental unsoundness.

In cases of this character the question to be tried is whether or not the party is of unsound mind.

We think it would be an unwarranted construction of the statute in question to hold that it requires that officer, not only to protect the interests of those who are of unsound mind, but to interpose in inquests the sole purpose of which is to determine the fact of mental unsoundness.

We think, therefore, that she was not affected or bound by the act of the prosecuting attorney in assuming as such to appear for her. The appearance for her by the other attorneys presents a very different question.

In our opinion a party may not only waive notice in such cases by a personal appearance, but may appear by attorney. The appellant can not insist that she was incompetent to employ counsel, because her standing on this appeal depends upon the assertion of her mental capacity and ability to

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transact business. It is not claimed in this appeal that their appearance for her was unauthorized. They not only continued to represent her in the circuit court, but represent her here. Even if their appearance for her in the circuit court had been unauthorized, it would be binding upon her until set aside. *Bush v. Bush*, 46 Ind. 70 (83). It was not a special, but a full appearance. It is not repudiated as unauthorized, but is in effect ratified by their continued representation of her interest. The record shows complete jurisdiction of the person of the appellant and of the case.

Three reasons were assigned for a new trial :

1st. That the verdict is not sustained by sufficient evidence.

While the evidence was conflicting, there was much evidence tending to support the verdict, and it can not be disturbed upon that ground.

2d. That the court erred in giving certain instructions.

We do not think it necessary to copy or comment upon the instructions given. There was no error in giving them for which the cause should be reversed.

The third reason assigned for a new trial is that the court erred in permitting counsel in the closing argument to the jury to criticise and call in question the veracity and good faith of a certain witness.

We are unable to see, in the remarks used by counsel, any thing impugning either the veracity or good faith of the witness in question. There is certainly nothing in the remarks complained of sufficient to justify a reversal of the cause.

Whatever may be the real merits of the controversy, as the record comes to us it discloses no error that will avail the appellant.

Judgment affirmed.

Filed March 8, 1892.

No. 16,312.

PARVIN v. WIMBERG ET AL.

ELECTIONS.—Construction of Law by Election Officers.—A construction of the election law accepted and acted upon by the officers of election, whose duty it is to administer the law, should not be ignored by the courts, unless it is palpably wrong.

SAME.—Power of Legislature Over.—It is within the power of the Legislature to prescribe the manner of holding elections and the mode in which electors shall express their choice.

SAME.—Elector Must Vote in the Manner Prescribed by Law.—If an elector does not choose to indicate his choice in the manner prescribed by law, he can not complain if his ballot is not counted.

SAME.—Australian System.—Stamping Ballot.—An elector can not indicate his choice in any other manner than by stamping one of the squares of his ballot with the stamp; and he can not stamp his ballot elsewhere, and leave the election board to guess at his intention.

SAME.—Irregularities.—Directory Provision of Law Violated.—Mere irregularities on the part of the election officers, or their omission to observe some merely directory provision of the law, will not vitiate an election.

SAME.—Directory and Mandatory Provisions.—What are.—If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must so hold whether the particular act in question goes to the merits or affects the result of the election or not, for such a statute is mandatory, and the courts can not enter into the question of its policy.

SAME.—Mandatory when Merits of Election are Affected.—Directory when Merits not Affected.—If a statute simply provides that certain things shall be done within a particular time, or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits.

SAME.—Departure from Mode of Holding Election, When Does not Invalidate.—A departure from the mode of holding an election as prescribed by statute, which does not deprive legal voters of their right to vote, or permit illegal voters to participate in the election, or cast uncertainty on the result, does not affect the validity of the election.

SAME.—Clerk's Initials Indorsed on Wrong Corner of Ballot.—The statute requiring election clerks to indorse their initials on the ballot is mandatory; but the requirement that they indorse their initials in a particular place is directory only; and a ballot indorsed at an improper place can not for that reason be rejected.

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Parvin v. Wimberg *et al.*

SAME.—Ballot Placed in Wrong Ballot-Box.—The fact that the election officers place a ballot in the wrong ballot-box by mistake will not vitiate the ballot and authorize its rejection in making the count.

STATUTE.—Construction.—Examining Other Statutes.—Legislative Intent.—Meaning Doubtful.—Purpose.—History.—For the purpose of construing a statute and ascertaining the legislative intent the courts will look to the whole statute and all its parts, and when such intention is so ascertained, it will prevail over the literal import and the strict letter of the statute; and where the meaning is doubtful and uncertain, the courts will look into the situation and circumstances under which it was enacted to other statutes, if there are any on the same subject, whether passed before or after the statute under consideration, whether in force or not, as well as to the history of the country, and will carefully consider, in this connection, the purpose sought to be accomplished.

From the Gibson Circuit Court.

A. Gilchrist, C. A. De Bruler and D. B. Kumler, for appellant.

J. M. Butler, A. H. Snow, J. M. Butler, Jr., J. E. Williamson, P. W. Frey and J. I. Walker, for appellees.

COFFEY, J.—At the November election for the year 1890 the appellant and Henry Stockfleth were opposing candidates for the office of county auditor of Vanderburgh county in this State.

The board of canvassers having declared the appellant duly elected, this proceeding was commenced by the appellee Henry Wimberg before the board of commissioners of that county, to contest the election upon the alleged ground that Stockfleth had received more votes for the office than had been cast for the appellant.

The cause was appealed to the Vanderburgh Circuit Court, from which a change of venue was granted to the Gibson Circuit Court.

In the latter court issues were formed, upon which the cause was tried by the court, resulting in a judgment against the appellant.

At the request of the appellant the court made a special

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finding of the facts in the case, from which it appears, among other things, that returns of the election were made by the judges of election and canvassed by the board of canvassers, and that it was determined by the canvass that the appellant had received 4,745 votes, and that Henry Stockfleth had received 4,735 votes, and thereupon the board declared the appellant duly elected.

It further appears that the appellant received twenty-seven votes at the election which were not counted for him, and that Stockfleth received sixty-one votes which were also rejected by the judges of election, and that the number so received by these parties, and not counted, were not included in the votes canvassed by the board of canvassers, and that the total number of votes cast at the election for the appellant was 4,772, and for Stockfleth 4,796.

The only question discussed by counsel on this appeal are questions arising on the ruling of the court below in overruling the appellant's motion for a new trial.

It is insisted by the appellant that the finding of facts above set out is not sustained by the evidence. It is also urged that the circuit court erred in admitting in evidence certain ballots offered by the appellee to sustain the issue tendered by him. It appears by the record before us that the appellee offered in evidence, on the trial of the cause, certain ballots, none of the squares upon which had been touched by the stamp, which ballots were admitted and read in evidence over the objection of the appellant.

As it is perfectly apparent that the court could not have made the finding set out above without counting some of these ballots, the question, therefore, as to whether they were admissible in evidence, and the question as to whether the finding is sustained by the evidence, may very properly be considered together.

The solution of these questions depends upon the construction of the act of the General Assembly, approved March 6th, 1889, known as the "Election Law:"

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Section 26 of this act prescribes the following form of ballot to be used at all subsequent general elections, viz.:

<div style="border: 1px solid black; padding: 2px; display: inline-block;">Dem.</div>	Device. Democratic Ticket.	<div style="border: 1px solid black; padding: 2px; display: inline-block;">Rep.</div>	Device. Republican Ticket.	<div style="border: 1px solid black; padding: 2px; display: inline-block;">Prohi.</div>	Device. Prohibition Ticket.
<div style="border: 1px solid black; padding: 2px; display: inline-block;">Dem.</div>	For Governor, Courtland C. Matson.	<div style="border: 1px solid black; padding: 2px; display: inline-block;">Rep.</div>	For Governor, Alvin P. Hovey.	<div style="border: 1px solid black; padding: 2px; display: inline-block;">Prohi.</div>	For Gov'r, Joseph D. Hughes.

Section 45 of the act provides that "When a voter shall have been passed by the challengers, or shall have been sworn in, he shall be admitted to the election room. * * * On entering the room the voter shall announce his name to the poll clerks, who shall register it. The clerk holding the ballots shall deliver to him one State and one local ballot, and the other clerk shall thereupon deliver to him a stamp, and both poll clerks, on request, shall give explanation of the manner of voting. * * * The voter shall then, and without leaving the room, go alone into any of the booths which may be unoccupied and indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names: * * * *Provided, however,* That if he shall desire to vote for all candidates of one party, * * * and none other, he may place the stamp on the square preceding the title under which the candidates of such party * * are printed, and the vote shall then be counted for all the candidates under that title, unless the name of one or more candidates under another title shall also be stamped, in which case the names of the candidates so stamped shall be counted."

It is contended by the appellant that the provision of this statute requiring the voter to indicate his choice by stamping the square is mandatory, while it is contended by the appellee that such provision is directory only, and that the voter may indicate his choice without touching the square with the stamp.

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It is conceded that this law is an entire departure from the modes of voting known and used in this State prior to its passage. Such being the case, before any election was held under this law, the two leading political parties in the State, through the chairman of their respective State central committees, selected six practicing attorneys of the State, conspicuous for their legal learning, to whom the law was referred, with a request that they would construe and interpret it, and prepare instructions for the information and guidance of the electors and election officers of the State.

In the report of these eminent lawyers are found the following instructions, viz. :

"First. You must get your ballots of the polling clerks in the election room.

"Second. If you want to vote a straight ticket, stamp the square on the left of the name of the party for whose candidates you wish to vote. If you do not wish to vote a straight ticket, then do not stamp the square to the left of the name of your party, but stamp the square to the left of the name of each candidate for whom you desire to vote, on whatever list of candidates it may be.

"Third. Do not mutilate your ballot, or mark it, either by scratching a name off or writing one on, or in any other way, except by stamping on the square or squares as above mentioned, otherwise the ballot will not be counted. * * * If a ballot is not stamped on one of the squares at the left of the titles of the tickets, it will be counted for the names with stamps on their squares to the left of them, and no others."

It is fair to presume that the electors and election officers throughout the State accepted this as the true construction of the statute under consideration, and thereupon, in conducting the ensuing election, acted upon it. This construction having been accepted and acted upon by the officers whose duty it was to administer the law, the courts should not now ignore it, unless it is palpably wrong. *Stuart v.*

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Laird, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cooley v. Board, etc.*, 12 How. 299; *Lithographic Co. v. Sarony*, 111 U. S. 53.

The construction placed upon the statute by the committee to whom it was referred is not palpably wrong, but, on the contrary, we think, the conclusion it reached is the correct one.

The doctrine that it is within the power of the Legislature to prescribe the manner of holding general elections, and to prescribe the mode in which the electors shall express their choice, is too familiar to call for the citation of authority.

In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is simple and easily understood. Furthermore, if he is illiterate, or is in doubt, the law makes ample provision for his aid. If he does not choose to indicate his choice in the manner prescribed by law, he can not complain if his ballot is not counted. *Kirk v. Rhoads*, 46 Cal. 398.

If we hold this statute to be directory only, and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots. If ballots are to be counted when no square is stamped, at what distance from the square shall the stamp be placed before it can be rejected?

One board of election may reach one conclusion as to a class of ballots where the squares are not stamped, and another board may reach another and different conclusion as to the same class; and thus uncertainty and confusion prevail in a matter which the Legislature intended, we think, should be certain.

By an act of the General Assembly, approved March 6th, 1891 (Acts of 1891, p. 124), section 45 of the act now under consideration was amended so that a stamp placed upon a

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ballot which does not touch a square thereon is declared to be a distinguishing mark, and the ballot is not counted.

This amendment was intended, we think, to make certain that which prior to its passage was left, in some measure, to construction, but it only makes certain that which was intended by the Legislature when it passed the original section.

But little, if any, aid can be derived from the adjudged cases under the English and Canadian statutes, by reason of the marked difference between those statutes and the one we are now considering, but the cases under those statutes hold that unless there is a substantial compliance by the electors with the provisions of the statute the ballot can not be counted. *Hazwell v. Stewart*, 1 Ct. of Sess. 925; *Robertson v. Adamson*, 3 Ct. of Sess. 978; 20 Journal of Jurisprudence, pp. 402-407; *Grant v. McCallum*, 12 Can. Law Journal, 113; *Olmstead v. Carpenter*, Hodg. El. Cases, 531; *Hawkins v. Smith*, 8 Can. Sup. Court, 676; Thornton Indiana Municipal Law, section 4709a.

Each ballot constitutes a separate and distinct written instrument, and, like all other written instruments, its construction is for the court. Of the one hundred and fifty-four ballots appearing in the record before us, not to exceed nineteen could by any possibility be counted for either the appellant or Stockfleth. In order that the elector may have his ballot counted at all, he must touch some one of the squares with the stamp. He can indicate his choice in no other manner, for this is the only mode prescribed by the law. He can not stamp his ballot elsewhere, and leave the election board to guess at his intention.

In our opinion the court erred in admitting in evidence, in support of the issue tendered by the appellee, ballots, no square upon which had been touched with the stamp. It follows, also, that the facts above set out are not supported by the evidence in the cause, for ballots not so stamped are

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not evidence that the elector intended to vote for either of the candidates for county auditor.

It appears from the record before us that in two of the precincts in Vanderburgh county the initials of the poll clerks were indorsed upon the lower right-hand corner of the back of the ballots instead of on the lower left-hand corner, as prescribed by section 34 of the election law. They were all indorsed in the same way. There was no fraud, no intentional violation of the law, but an innocent, honest mistake on the part of the election officers.

It is contended that these ballots should not have been counted, for the reason that the ballots were not indorsed as prescribed by the statute, and that the provisions of the statute requiring the ballots to be indorsed by the poll clerks at a particular place named is mandatory, while it is contended on the other hand that such requirement is directory only.

The general rule is, that mere irregularities on the part of election officers, or their omission to observe some merely directory provision of the law, does not vitiate the election.

Much difficulty, however, is often experienced in determining whether the provisions of a particular statute are mandatory or directory. If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts, whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits or affects the result of the election or not; for such a statute is mandatory, and the court can not enter into the question of its policy. On the other hand, if a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits. *McCrary Elections*, section 190; *Barnes v. Board*, etc., 51 Miss. 305; *Wheelock's Case*, 82 Pa. St.

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297; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 53 Mo. 350; *Jones v. State, ex rel.*, 1 Kan. 273; *Gilleland v. Schuyler*, 9 Kan. 569.

In the case of *Gilleland v. Schuyler*, *supra*, it was said by the court: "Questions affecting the purity of elections are in this country of vital importance. Upon them hangs the experiment of self-government. The problem is to secure, first, to the voter a free, untrammelled vote; and secondly, a correct record and return of the vote. It is mainly with reference to these two results that the rules for conducting elections are prescribed by the legislative power. * * To hold these rules all mandatory, and essential to a valid election, is to subordinate substance to form, the end to the means. Yet on the other hand, to permit a total neglect of all the requirements of the statute, and still sustain the proceedings, is to forego the lessons of experience, and invite a disregard of all those provisions which the wisdom of years has found conducive to the purity of the ballot-box. Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials should not be permitted to disfranchise a district."

So it has often been held by this court that a departure from the mode of holding an election as prescribed by statute, which does not deprive legal voters of their right to vote, or permit illegal voters to participate in the election, or cast uncertainty on the result, does not affect the validity of the election. *Gass v. State, ex rel.*, 34 Ind. 425; *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185; *Dobyns v. Weadon*, 50 Ind. 298; *Mustard v. Hoppess*, 69 Ind. 324; *Duncan v. Schenk*, 109 Ind. 26.

Judge McCrory, in his work on Elections, section 93, says: "The principle is that irregularities which do not tend to effect the results are not to defeat the will of the majority. * * * The officers of election may be liable to punishment for a violation of the directory provisions of a

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statute, yet the people are not to suffer on account of the default of their agents."

Section 34 of the election statute provides that "At the opening of the polls, after the organization of, and in the presence of, the election board, the inspector shall open the packages of ballots in such a manner as to preserve the seals intact. He shall then deliver to the poll clerk of the opposite political party from his own, twenty-five each of the State and local ballots, and to the other poll clerk the stamps for marking the ballots. The poll clerks shall at once proceed to write their initials, in ink, on the lower left hand corner of the back of each of said ballots, in their ordinary hand writing, and without any distinguishing mark of any kind. As each successive elector calls for a ballot the poll clerks shall deliver to him the first signed of the twenty-five ballots of each kind; and the inspector shall immediately deliver to the poll clerks another ballot of each kind which the poll clerk shall at once countersign, as before, and add to the ballots already countersigned, so that it shall be delivered for voting after all of those theretofore countersigned."

The sections following provide for the manner of conducting the election until the close of the polls.

Section 52 provides that "The board shall then proceed to canvass the votes, beginning first with the State ballots and completing them before proceeding with the local ballots, by laying each ballot upon the table, in the order in which it is taken from the ballot-box, and the inspector and the judge of the election, differing in politics from the inspector, shall view the ballots as the names of the persons voted for are read therefrom. In the canvass of the votes any ballot which is not indorsed with the initials of the poll clerks, as provided in this act, and any ballot which shall bear any distinguishing mark or mutilation shall be void and shall not be counted, and any ballot or part of a ballot from which it is impossible to determine the elector's choice of candi-

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dates, shall not be counted as to the candidate or candidates affected thereby."

It is not claimed that the failure of the poll clerks to indorse their initials at the place on the back of the ballots indicated by the statute constituted a distinguishing mark, for they were all indorsed alike; but the claim is that the statute is mandatory as to the place upon the ballot at which the initials shall be written. The purpose of construing a statute is to arrive at the intention of the Legislature. For that purpose the courts will look to the whole statute, and all its parts, and when such intention is so ascertained, it will prevail over the literal import and the strict letter of the statute; and where the meaning is doubtful and uncertain the courts will look also to the situation and circumstances under which it was enacted, to other statutes, if there are any upon the same subject, whether passed before or after the statute under consideration, whether in force or not, as well as to the history of the country, and will carefully consider, in this connection, the purpose sought to be accomplished. *Storms v. Stevens*, 104 Ind. 46; *Stout v. Board, etc.*, 107 Ind. 343; *May v. Hoover*, 112 Ind. 455; *Board, etc., v. Board, etc.*, 128 Ind. 295.

A study of the statute upon the subject of elections leaves no doubt that its purpose is to secure a fair expression of the will of the electors of the State, by secret ballot, uninfluenced by bribery, corruption or fraud. The disfranchisement of whole precincts by reason of an honest mistake on the part of election officers is inconsistent with this purpose.

The immediate purpose of the provisions of section 34 is to prevent the counting of fraudulent votes by requiring the poll clerks to indorse their initials upon the official ballots, to the end that they be identified when taken from the ballot-box. This purpose is accomplished as well by the indorsement of such initials in one place as in another on the back of the ballot. Of course, so much of the statute as requires the ballots to be indorsed with the initials of the

poll clerks is mandatory, but we are of the opinion that so much of the statute as requires initials to be indorsed at a particular place on the back of the ballot is directory only, because the purpose of the Legislature is accomplished when the indorsement is made in such manner as to enable the election officers, in conducting the count, to identify it as the official ballot.

Judge Cooley, in his valuable work on Constitutional Limitations, p. 77, says: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time nor in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purposes of the statute." See, also, *Martin v. Pifer*, 96 Ind. 245; *Middleton v. Greeson*, 106 Ind. 18; *In re Douglas*, 58 Barb. 174.

In our opinion the circuit court did not err in refusing to reject the ballots cast in the precincts now under consideration.

By the provisions of section 10 of this statute, the board of county commissioners is required to provide two ballot boxes, one for the reception of the ballots cast for State officers, and another for the reception of the ballots cast for local officers. In canvassing the votes cast at three of the precincts in Vanderburgh county, some of the local ballots were found in the ballot box provided for the reception of the ballots cast for State officers. These ballots bore the initials of the poll clerks, and were properly stamped, but were rejected for no other reason than that they were found in the wrong ballot box. *Prima facie*, these ballots should have been counted. Under the safeguards provided by this statute, it is next to impossible that they could have gotten into the ballot box without being placed there by some of the

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election officers. To have placed them in the box unless received from some qualified elector of the precinct would have been, under the statute, a crime. The presumption of law is always against crime, and, without any showing to the contrary, the presumption is that these ballots were placed in the wrong box by the mistake of the election officers.

Judge McCrary, in his work on Elections, section 196, says: "It is a rule, well grounded in justice and reason, and well established by authority and precedent, that the voter shall not be deprived of his rights as an elector, either by the fraud or the mistake of the election officer, if it is possible to prevent it."

The case of *People, ex rel., v. Bates*, 11 Mich. 362, is much in point here. In that case an election was held for State and county and for city officers on the same day and at the same polls. One ballot-box was used for the reception of the ballots cast for State and county officers, and another ballot-box was used for the reception of ballots cast for city officers, but the same judges and inspectors conducted both elections. When canvassing the vote it was ascertained that some of the votes cast for city officers had been deposited in the box used for the reception of the ballots cast for State and county officers. It was held that the ballots so found in the box prepared for the reception of the ballots cast for State and county officers should be counted for the city officers for whom they were cast. The Supreme Court of Michigan said: "The two elections, though held upon the same day, were in law distinct and independent of each other, as much as if they happened on different days; and it is, in fact, only in each alternate year that they can occur together. But, though thus distinct, and the ballots to be deposited in separate boxes, yet as both were held together under the supervision of the same inspectors, with both boxes before them for the reception of ballots, the inspector receiving the ballot might be liable, by honest mistake, occasionally, to deposit a ballot in the wrong

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box ; and if he understood that the ballots found in the wrong box were in no case to be counted, he might do the same thing for a fraudulent purpose. But the elector is not to be deprived of his vote either by the mistake or fraud of the inspector in depositing it in the wrong box, if the intention of the voter can be ascertained with reasonable certainty. To hold otherwise would be to give more effect to the letter than to the manifest purpose of the statute."

In this case, as in all others, it is an easy matter to ascertain whether the local ballots in the two boxes exceed the number of votes cast by the legal voters of the precinct by comparing the number with the poll list.

There are some other questions of minor importance discussed by counsel in their able briefs in this case, but, as they may not arise upon another trial of the cause, we deem unnecessary to decide them now.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed March 17, 1892.

No. 16,051.

JEWELL v. THE TOWN OF SULLIVAN.

APPELLATE COURT.—*Jurisdiction.*—In an action for damages, where the questions arise upon the rulings of the trial court, in refusing to give judgment on the general verdict—the verdict being in favor of the appellant for \$1,000—and awarding it upon the answers of the jury to the interrogatories, the jurisdiction is in the Appellate Court, as the record shows that the actual controversy is as to the sum of \$1,000, and that the action is for the recovery of money only.

From the Sullivan Circuit Court.

W. C. Hultz, W. C. Barrett, O. B. Harris and W. S. Maple, for appellant.

G. W. Buff and J. S. Bays, for appellee.

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ELLIOTT, C. J.—The appellant, in her complaint, seeks to recover against the appellee damages for injuries sustained because of the alleged negligence of the appellee in permitting one of its streets to become unsafe. If the questions in the case arose upon the complaint, jurisdiction would be in this court, but there is no question upon that pleading, for the questions arise upon the rulings of the trial court in refusing to give judgment on the general verdict, and awarding it upon the answers of the jury to interrogatories. The specifications in the assignment of errors relate entirely to the rulings upon the verdict and the answers to the interrogatories returned by the jury. The verdict is in favor of the appellant and fixes the damages at \$1,000. All that the appellant claims is that sum, and hence no greater amount is in controversy, although a larger sum is claimed in the complaint. As the record shows that the actual controversy is as to the sum of \$1,000, and that the action is for the recovery of money only, the jurisdiction is in the Appellate Court.

Ordered that the case be transferred to the Appellate Court by the clerk.

Filed March 16, 1892.

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PROCESS.—Non-Resident.—Service of Process Upon.—A non-resident of the State, whose presence in the State is purely voluntary, and for the purpose of personal supervision of a business which he is conducting within the State, may be legally served with process in an action in which he is made defendant.

NEGLIGENCE.—Damages.—Complaint.—Insufficiency of.—In an action to recover damages for an injury alleged to have been sustained by reason of the fact that the plaintiff was ordered by the superintendent of the mill to leave his particular work and to go and perform a certain other service, and that he was injured by a stone slab falling upon him which

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had been negligently left unpropped and unsupported, the complaint is insufficient. It does not charge the superintendent with any negligence, even if the defendant would be answerable for his negligence on the theory that he was a vice-principal. It is not averred that he superintended the unloading, or directed how the stone should be placed or left, or that he had any knowledge whatever of the manner in which it was left.

PLEADING.—Complaint.—Insufficiency of.—*May be Raised by Motion in Arrest.*—The objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur, and is cause for a motion in arrest of judgment.

SAME.—Intendment After Verdict will not Supply an Omitted Essential Fact.—The doctrine of intendment after verdict, whereby a pleading that would be held bad on demurrer will be held good after verdict, will aid by presumption a defective or imperfect averment of a fact, but will not supply an omitted fact which is necessary to the statement of a cause of action.

From the Monroe Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellant.

J. Jiles, C. C. Matson, R. A. Fulk, R. W. Miers and *E. Corr*, for appellee.

MCBRIDE, J.—The complaint in this case alleges that the appellant was the owner and was engaged in operating a stone-quarry and stone saw-mill in Lawrence county, in which he employed a great number of men, the appellee among the number; that one Roberts was superintendent of the mill, and had charge of the workmen there employed; that the appellee was ordered by Roberts to leave the particular work in which he was engaged and to go and perform a certain other service, and that while he was obeying the order thus given, a certain large stone slab fell upon him, crushing and greatly and permanently injuring him.

He brought this action to recover damages for the injury thus sustained, and recovered a judgment.

Of several errors assigned and discussed we find it necessary to consider only two.

These relate to the action of the court in sustaining a demurrer to a plea in abatement filed by the appellant, and in

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overruling a motion in arrest of judgment. The plea in abatement alleged that the appellant was, when the suit was brought and summons served, and long had been, a resident of the State of Illinois, and not a resident of the State of Indiana. Summons was served upon him in Lawrence county, and, while the fact is not shown by the plea, his counsel in his brief informs us that he was at the time there giving personal attention to his interests in the stone-quarry. As against non-residents of the State, actions may be commenced against them and process served on them in any county in the State where they may be found. Section 312, R. S. 1881.

While the statute is general in its terms, and is sufficiently broad to authorize service of process on non-residents in all cases when they come into the State, an exception exists when their presence is for the purpose of attending the courts of the State either as suitors or as witnesses. Public policy demands that non-residents of the State, whose duty or interest requires their attendance in our courts, should be exempt from the service of civil process during such attendance. *Wilson v. Donaldson*, 117 Ind. 356. There can be no good reason, however, why a non-resident of the State, whose presence in the State is purely voluntary, and for the purpose of personal supervision of a business which he is conducting within the State, should be thus exempt from service of process. The plea was bad.

The complaint is in two paragraphs. No demurrer was filed, and its sufficiency was questioned for the first time by the motion in arrest of judgment.

The appellee is entitled to recover, if at all, only because of the actionable negligence of the appellant, or because of the negligence of others for which the appellant is answerable. The averments in both paragraphs of the complaint relating to the alleged negligence which caused the injury are substantially the same. We quote from the first paragraph :

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"That said stone had been unloaded from off the said mill trucks, at the instance and order of said Roberts; that said stone was long and wide, and six or eight inches thick, and was set on its edge, and negligently left unpropped and unsupported, in close proximity to this plaintiff, and that in consequence of the negligent and careless manner of leaving the said stone unpropped and unsupported, the same, without any warning, and without any carelessness or negligence on the part of this plaintiff, the said stone fell over, on and against this plaintiff, and injured, crushed and bruised and wounded him," etc.

The only negligence charged is that the stone was left unpropped and unsupported, but whose act this was does not appear. Assuming that Roberts was a vice-principal, and the appellant answerable for his negligence (which we do not decide), he is not charged with any negligence. All the complaint charges that he did was to order that the stone be unloaded.

It is not averred that he superintended the unloading, or directed how the stone should be placed, or left, or that he had any knowledge whatever of the manner in which it was left. There is an entire absence of averment of any fact tending to connect the appellant with the alleged negligence.

The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur, and is cause for a motion in arrest of judgment. Works Pr. and Pl., section 1045; *McMillen v. Terrell*, 23 Ind. 163; *Heddens v. Younglove*, 46 Ind. 212; *Newman v. Perrill*, 73 Ind. 153.

The defect in the complaint is of such a character that it could not be cured by verdict. The doctrine of intendment after verdict, whereby a pleading that would be held bad on demurrer will be held good after verdict, will aid by presumption a defective or imperfect averment of a fact, but will not supply an omitted fact which is necessary to the state-

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ment of a cause of action. *Newman v. Perrill, supra*; Works Pr. and Pl., section 533.

The court erred in not sustaining the motion in arrest of judgment.

Judgment reversed.

Filed March 18, 1892.

No. 15,443.

KILLIAN v. ANDREWS ET AL.

DRAINAGE.—Description of Land.—Notice.—Legislature May Determine.—

It is competent for the Legislature to provide how lands may be described in a petition for a drain, and what notice must be given.

SAME.—Personal Liability of Land-Owner.—The owner of land which is assessed with benefits in the construction of a ditch is not personally liable for such assessment.

SAME.—Prior Mortgage Lien.—The lien of a drainage assessment is subordinate to the lien of a pre-existing mortgage.

SAME.—Estoppel.—The holder of a mortgage, which is a prior lien to the drainage assessment, by silently standing by and permitting the drain to be constructed, is not estopped to assert that his lien is prior to the lien of the assessment.

From the Cass Circuit Court.

D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellant.

D. P. Baldwin, for appellees.

MILLER, J.—The appellee Lucy Ann Andrews brought this action against the appellant to quiet her title to a tract of land.

The complaint was answered by a general denial, and also by a second paragraph, which does not require to be noticed.

The appellant also filed a cross-complaint, in which he asked for the foreclosure of a lien against the land acquired by him under certain drainage proceedings.

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Issues were joined on the cross-complaint by a general denial and other defences, and the cause tried by the court, who, at the request of parties, made a special finding of the facts and conclusions of law.

So much of the special finding as we deem necessary to present the questions of law which must control the decision of this case is as follows :

That William H. Stanley, being the owner of the land described in the complaint, mortgaged the same to Wilhelmina Cochran on the 16th day of July, 1877, for \$3,000; that said mortgage was duly recorded, and was afterwards, at the April term, 1884, of the Cass Circuit Court, foreclosed and the land sold July 5, 1884, by the sheriff, on the decree of foreclosure, to Quincy A. Myers; that Myers received a certificate of purchase from the sheriff, and on the 15th day of the month had it recorded in the *lis pendens* record of Cass county.

That in September, 1884, Elizabeth Cost and Henry Cost filed their petition in the Cass Circuit Court, praying for the establishment of a ditch, setting out in their petition therefor that the lands described in the complaint would be benefited by the construction thereof; that afterwards such other proceedings were had in said circuit court, in and about the matter of such petition for drainage, as that, on the 22d day of December, 1884, the ditch was established by an order of the court, and the assessment of benefits before that time made by the ditch commissioners was affirmed, and the ditch was ordered to be constructed; that at the time of the filing of the petition, and during the pendency of the proceedings, the lands described in the complaint appeared on the tax duplicate of the county, and on the transfer books, in the name of William Stanley, and the lands were described in the petition for drainage as belonging to him; that neither the mortgagee nor Myers was mentioned in the petition, or the notices of the pendency thereof, or the notices of assess-

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ment, as being the owner of or having any interest in the lands.

It is also made to appear from the findings that the lands described were assessed for the construction of the drain, and were afterwards sold by the county treasurer to the appellant for the amount of the assessment, penalty and interest; that in the year 1883, the lands were sold for taxes and a tax certificate issued to one McGovern, who, in 1885, received a tax deed; that on the 4th day of August, 1885, Myers obtained a sheriff's deed for the land, which was, in proper time, duly recorded. In December, 1885, Myers conveyed the land to one Jasper N. Booth, and in June, 1887, McGovern conveyed his interest in the land by a quitclaim deed to Booth. On the 26th day of August, 1887, Booth and wife and William H. Stanley and wife conveyed the land to the appellee; that at the time she purchased the land and took the deed she required and obtained from her grantors a bond and an agreement to indemnify her should the ditch assessment be a lien on the land, and she compelled to pay it.

The court concluded the law to be: "That the original assessment for the construction of the ditch is no lien upon the land and is a cloud upon the plaintiff's title."

This conclusion was excepted to, and presents the principal question in the case.

The petition for drainage mentioned in this case was evidently intended to conform to the provisions of the act of March 8, 1883, now section 1175 of Elliott's Supp., which provides that "Such petition shall be sufficient to give the courts jurisdiction over the lands described therein, and power to fix a lien thereon if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer kept by the auditor of the county where the same is situate."

It is not disputed but that the petition was drawn in strict conformity with the provisions above quoted, and the pro-

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ceedings regular; and that if Stanley had continued to own the land it would have been bound by the assessment made for the construction of the ditch. But it is earnestly contended that, the land having been sold at sheriff's sale to Myers some two months prior to the time of filing the petition for drainage, his title, when he obtained a sheriff's deed, related back to a time anterior to the commencement of the proceedings for drainage; and that neither he nor those claiming under him are affected by a suit or proceeding to which they were not parties, and of which they had no notice.

The act under consideration makes no provisions for making lien-holders parties to such proceedings or giving them notice, except the notice required upon the filing of the petition. This is in harmony with the provision that it was only necessary to describe the lands as belonging to the one in whose name it appears on the tax duplicate, to enable the court to take jurisdiction and fasten a lien upon the land.

It was competent for the Legislature to provide how the lands should be described in the petition, and what notice should be given.

In speaking of a notice of this kind, this court, in the case of *Carr v. State, etc.*, 103 Ind. 548, said: "It is competent for the Legislature to provide what kind of notice shall be given, and where the notice is of the character prescribed by statute, it is sufficient."

In *Scott v. Brackett*, 89 Ind. 413, it is said: "It will be observed that this statute makes no provision for personal notice. The only notice required is constructive. With such notice, a lien may be fixed upon the land affected by the proposed work." *Garvin v. Daussman*, 114 Ind. 429; *Johnson v. Lewis*, 115 Ind. 490.

It is not alleged in any of the pleadings, or found by the court, that Myers was ignorant of either the construction of the ditch or the making of the assessment, upon the Stanley land which he purchased.

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The notice required by the statute having been given, the presumption is, in the absence of an averment to the contrary, that the notice conveyed to him knowledge. This notice was certainly sufficient to sustain the proceedings from a collateral attack. *McBride v. State, etc., ante*, p. 525; *Montgomery v. Wasem*, 116 Ind. 343; *Pickering v. State*, 106 Ind. 228; *McMullen v. State, ex rel.*, 105 Ind. 334; *Hackett v. State, etc.*, 113 Ind. 532; *Jackson v. Smith*, 120 Ind. 520; *Peters v. Griffie*, 108 Ind. 121.

In this case the proceedings were instituted, and the ditch was constructed, after Myers purchased the land at sheriff's sale. The assessment was made upon the theory that the land he so purchased was benefited in an amount equal to the assessment made against it. *Heick v. Voight*, 110 Ind. 279; *Ross v. Stackhouse*, 114 Ind. 200; *Garvin v. Dausman, supra*; *Jackson v. Smith, supra*. In the latter case this pertinent language was used:

"The assessment is made upon the theory that the benefit to the property is equivalent to the expense. The owner, therefore, receives a thing of value, and he ought, in equity and good conscience, to pay for it."

The statute, under which the proceedings for drainage were instituted, provides that the assessment shall be a lien "from the time of filing the petition," which in this case was in September, 1884.

The mortgage, under which the appellee claims title, was executed in July, 1877.

The assessment made for improvements is strictly *in rem*, and gives no right of action against the land-owners, assessed as individuals.

In the opinion of the writer liens of this character do not stand upon the footing of ordinary encumbrances, but attach to the land benefited by the improvement, without regard to its individual ownership, and are not displaced by sales under pre-existing liens; that such pre-existing liens may be *prior* liens, but that they are not superior ones. In his

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opinion, a lien created and enforced only because it confers a public, in addition to the private benefit, received by the land-owner, puts it upon the same basis occupied by a lien for taxes.

The majority of the court, however, regard this question as foreclosed by the cases of *State, ex rel., v. Aetna Life Ins. Co.*, 117 Ind. 251, *Cook v. State, etc.*, 101 Ind. 446, *Chaney v. State, ex rel.*, 118 Ind. 494, *Deisner v. Simpson*, 72 Ind. 435, in which it was held that the lien of a drainage assessment is subordinate to the lien of a pre-existing mortgage.

The statute, as above stated, making no provisions for giving notice to encumbrancers, or making them parties to the ditch proceedings, we do not see how notice on the part of such encumbrancer of the construction of the ditch, or of the pendency of the action, can be of importance.

Standing silent and permitting the ditch to be constructed, or anything short of a promise to pay, or something calculated to deceive, can constitute an estoppel against one who holds a mortgage on lands being drained, for such conduct on the part of a mortgagee is entirely consistent with a reliance upon the priority of the mortgage lien.

There is another element discussed in this case that has only been referred to in the statement of facts: That Booth and wife and William H. Stanley and wife conveyed the property in controversy to the appellee, and that at the time of the execution of the deed they executed to her a bond and an agreement to indemnify her against this ditch assessment.

From this it appears that the appellee, at the time she instituted this suit to quiet her title against this lien for an assessment, which in equity and good conscience should be paid, held in her hands an indemnity, to save her harmless, in case she was compelled to pay such lien, executed by the land-owner, who owned the land, at the time the assessment became a lien, and who was a party to the proceedings.

We do not feel called upon to enter into a discussion of the circumstances under which a court of equity will seize

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upon a fund, security or indemnity growing out of a sale of real estate, and make it the medium through which to work out the equities of the transaction, an example of which is found in the case of *McGuffey v. McClain*, ante, p. 327.

In order to entitle the appellant to the affirmative relief claimed, it should have been relied upon in his cross-complaint, and Stanley and wife, if not others, should have been joined as defendants to the cross-complaint. Neither of these things appears to have been done, and, therefore, any discussion of this question would be foreign to the case before us.

We find no error in the record.

Judgment affirmed.

Filed March 17, 1892.

No. 15,097.

YANCEY ET AL. v. THOMPSON ET AL.

DRAINAGE.—Remonstrance.—Signed by Two-Thirds of Land-Owners.—Who May be Counted.—Certain persons petitioned the board of county commissioners for the establishment of a ditch, describing the lands and giving the names of the owners thereof that would be affected thereby. After proper notice the petition was referred to three commissioners, who included in their report descriptions of lands and the names of the owners thereof not described and named in the petition. Certain of the land-owners, two-thirds in number of the entire number reported by the commissioners that would be affected by the proposed ditch, filed a remonstrance against its establishment, and the proceedings were dismissed. *Held*, that the land-owners whose lands and names were described and inserted in the petition as lands and persons who would be benefited or damaged by said proposed ditch, could not be counted in ascertaining whether two-thirds of the persons so benefited or damaged had signed said remonstrance. Elliott's Supp., section 1186.

From the Benton Circuit Court.

M. H. Walker and *G. H. Gray*, for appellants.

U. Z. Wiley, for appellees.

130	585
141	433
180	585
el62	372

130	585
L165	552
130	585
170	468

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OLDS, J.—This was a proceeding commenced in the circuit court in pursuance of the drainage act of 1885 for the construction of a drain. A proper petition was filed, and the matter was referred to the drainage commisisoners in accordance with the statute, and the commissioners made report, naming in their said report lands as affected by such proposed work which were not named in the petition. The persons whose lands were thus named in the report and not named in the petition constituted two-thirds of the land-owners resident in the county where the lands affected are situated, whose lands were reported as affected by the proposed drain remonstrated in writing against the construction of the proposed drain, and the court sustained their remonstrance and dismissed the proceedings at the costs of the petitioners. Proper exceptions were reserved, and this ruling of the court is insisted upon as error. This presents for the first time the question as to the proper construction to be placed on section 3 of the Drainage Act of 1885, Elliott's Supp., section 1186.

It is evident that this statute, as well as others relating to the same subject, was drawn with a view to promote drainage, and with an intention to make certain steps once taken in the progress of drainage proceedings final, and to prohibit their being interfered with or set aside, even by persons who might be brought into and become parties to the proceeding after such steps were once taken. Section 2 of the act (Elliott's Supp., section 1185) provides for the institution of the proceeding, the filing of the petition and what it should state, requiring a description of the lands which, in the opinion of the petitioners, will be affected, together with the names of the owners thereof, and it requires that the petition shall be verified. It was evidently the intention of the legislators that this section would secure the insertion into the petition of a description of all lands which the petitioners had reason to believe would be affected by the proposed drain and the names of the owners. The law presumes upon the

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good faith of the proceedings. Section 3 provides for a notice of the filing of the petition and ten days after notice is given to those named in the petition to demur, remonstrate or object to the form of the petition or to the drainage commissioners. It also provides that at this stage of the proceedings the petition shall be dismissed provided two-thirds of the land-owners named as such in such petition are residents in the county or counties where the lands affected are situated shall remonstrate in writing against the construction of such drain. First, the Legislature has made provision for bringing all persons interested before the court by requiring their lands to be described, and they to be named in the petition, and for notice to be given to them. It is then provided that objection may be made to the form of the petition, and to the drainage commissioners acting in the matter, and for the dismissal of the proceedings on remonstrance.

It is then provided that in case no remonstrance is filed, and if the court shall deem the petition sufficient, the court shall make an order referring the petition to the drainage commissioners. It provides that all objection to the petition or to the acting of any drainage commission not made within the ten days shall be waived. The manner of proceeding by the commissioners is pointed out and their duties defined. Finally in section 3 it is provided that where lands not named in the petition are named in the report of the drainage commissioners, ten days' notice of the time of hearing the report shall be given to the owner of such land at the cost of the petitioners, and the court shall continue the hearing of the whole petition until the notice shall have been given, and that such proceedings shall be had in relation to such report as if the whole lands had been named in the petition.

It was evidently intended by the Legislature that all the parties interested should be brought into court by the petition and notice, and all preliminary questions relating to the

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petition, the qualifications of drainage commissioners, and as to the further prosecution of the proceedings, should be finally settled before the matter was referred to the drainage commissioners and additional costs incurred. To further protect the interest of all parties whose lands might be considered by the drainage commissioners to be affected, it is provided that if the petitioners should have erred in their judgment as to what land would be affected, or if the commissioners should be of the opinion that other lands than those named in the petition would be affected, they should be notified of the proceedings by the petitioners at their own costs, and that such land-owners should not have any right at that stage of the proceedings to raise any objection to the form of the petition, the competency of the drainage commissioners to act, or in relation to the prosecution of the proceedings, yet they should have the same rights as those who were named in the petition as to their substantial rights, as presented by the report of the commissioners. The grounds of objection and remonstrances to the report which may be made are enumerated and fixed by section 4 of the act.

The latter clause of section 3 provides, in effect, that where lands not named in the petition are named in the report, they shall be regarded as having been, in fact, described, and the owners named in the petition. It is evident from this provision, we think, that the new parties brought in by the report shall have the same rights as the others would have at that stage of the proceedings. The time has then passed for a person whose lands were, in fact, described in the petition, and who was, in fact, named in the petition, to raise any objection to the petition, to the competency of the drainage commissioners, or for two-thirds of them to remonstrate and dismiss the petition. The new parties occupying the same attitude, and having only the same rights as the old ones at that time, they can raise none of those objections. If by reason of the new parties having had no

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notice of the proceedings up to this date, they can go back and remonstrate and dismiss the case, they certainly would on the same ground go back and object to the form and sufficiency of the petition and to the competency of the drainage commissioners. We do not think such was the intention of the statute, but, on the contrary, it was intended to bring the new parties in by notice, and that they should occupy the same attitude and have the same rights that the other parties had at that stage of the proceedings, and which in fact gives them a hearing and protects them in all their substantial rights, and prohibiting them from raising any objection to the proceedings had up to that time.

It follows from the conclusion we have reached that the court erred in dismissing the petition on the remonstrance of the appellees on the grounds that two-thirds of those whose lands were affected, as shown by the report, remonstrated against the construction of the drain.

Judgment reversed, with instructions to the court below to set aside the judgment of dismissal and to proceed in accordance with this opinion.

Filed March 18, 1892.

No. 15,557.**BEATY v. ROBERTSON ET AL.**

BOUNDARIES.—Variance Between Plat and Field-Notes.—Which Controls.—

If there is any difference between the plat and field-notes of the original government survey, the former must control, for it represents the lines and corners as fixed by the surveyor general, and by which the land was sold.

From the Jackson Circuit Court.

W. K. Marshall, for appellant.

B. H. Burrell, *R. Applewhite* and *J. F. Applewhite*, for appellees.

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MILLER, J.—The appellant brought this suit to recover a tract of land six chains and seventy-five links in width, and extending from the Indiana boundary line south to the south line of section six, in township six north, of range five east.

If the strip of land in controversy is in the southeast quarter of the section, it belongs to the appellant; if in the southwest quarter, it belongs to the appellees.

The dispute as to the location of the line dividing the section grows out of the manner in which the original government survey was made by the deputy surveyor, long prior to the entry of either of these tracts of land.

This section is fractional, and contains an amount of land in excess of the required number of acres necessary for a section.

Under these circumstances, the act of Congress regulating the mode of making such survey (Act of May 10th, 1800; 2 U. S. Statutes at Large, 79, section 3), provides as follows:

“And in all cases where the exterior lines of the townships thus to be subdivided into sections or half sections, shall exceed or shall not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half sections in such township, according as the error may be in running the lines from east to west, or from south to north; the sections and half sections bounded on the northern and western lines of such township shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity.”

The original survey, after running and establishing the township lines, should have begun in the southeast corner of the township, and thence, working northward and westward, laying off full sections, by necessity putting any excess, or deficiency, in the quantity of land in the northern and western tiers of sections.

We may infer that this method of dividing the township into sections was pursued.

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The same rule should have been pursued in the subdivision of the sections on the northern and western tiers of sections in their subdivision into quarter sections; for by no other method could the excess or deficiency of land be thrown where the act of Congress required—that is, on the northern and western exterior of subdivisions of the section.

Exemplifications of the field notes of the original survey, and of the plat of the section, were given in evidence by both parties to the suit, from which it appears that the deputy surveyor, in running the south line of this section, commenced at the southwest corner of the section, and ran east 40 chains, where he set a quarter-section post, and thence east to the southeast corner. In running the north line, he ran from the northeast corner west 40 chains, where he set a post, and thence to the northwest corner of the section.

The effect of this method of setting off the section was to throw the excess of land in the south half of the section, on the eastern and interior subdivision of the section, and in the north half, on the western or exterior subdivision.

The copy of the field-notes, certified to by the acting commissioner of the general land office, gives the field-notes of the south line as follows :

East.	Between Sec's 6 & 7, T. 6 N., R. 5 E.
17.00.	A brook 50 lks. wide, course S. W.
40.	Set qr. Sec. post [bearing omitted].
	[This post should stand at 40 chains from the cor to Sec's 5, 6, 7 & 8, & of course is wrong. S. W].
80 3.	Set a post on Indian boundary, from which
	A Beech 10 in diar. bears N. 19, E. 4 lks. dist.; &
	A do 10 " " " S. 55, W. 66 " "
	Land flat & wet; timber: Beech, Oak, Ash & Walnut.

A copy of the same instrument, certified to by the auditor of state, omits that portion which is enclosed in brackets.

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The appellant claims that this portion of the field-notes is an unauthorized interpolation made by some one in the land office.

We are unable to agree with counsel in this position. We could entertain no such presumption against the integrity of the records in a department of the general government.

The discrepancy between the two certified copies of these field notes is, in part, explained by reference to the plat given in evidence by both plaintiff and defendant, which gives not only the dimension of the boundary lines, but also sets forth the location of the half section line running north and south of the Indian boundary line, and the number of acres contained in each lot or parcel of ground contained in the section.

"If there was any variance between the plat and field-books the former must have controlled, for it represented the lines and corners as fixed by the surveyor general, and by which the land was sold; and the law declares that the corners and boundaries as returned *by*, not *to*, that officer, shall be the corners and boundaries." *Doe v. Hildreth*, 2 Ind. 274 (280).

In *Chapman v. Polack*, 70 Cal. 487, it is said:

"From *data* furnished by the surveyor the plats are prepared. One of the objects of the manual and law was to simplify the mode of disposing of the public lands, so that without cumbering patents with descriptive field notes the plats of the surveys should afford all necessary information to purchasers, and at the same time afford a convenient and certain description by reference of the land conveyed; and these official plats are made the basis of all sales and selections of the public lands, and are solely referred to in the usual patents to show what lands are patented."

In *Vance v. Fore*, 24 Cal. 436, it was said: "The map may be regarded as a daguerreotype of the land which the grantor intended to convey."

In *Cornett v. Dixon*, (Ky.) 11 S. W. R. 660, a patent made in accordance with a plat and survey was held sufficient to

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control the length of a line as given in the field-notes of the surveyor.

In *Cragin v. Powell*, 128 U. S. 691, the court said: "It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself."

See, also, to the same effect, *Whitney v. Detroit Lumber Co.*, 78 Wis. 240; *Jefferis v. Land Co.*, 134 U. S. 178.

The plat shows that the half section line, running north and south, is a straight line throughout, and does not contain a jog or offset at the Indian boundary line, which runs from near the northwest corner to near the southeast corner of the section.

If the theory of the appellant's counsel, that the usual method of surveying was departed from on account of the surveys on either side of the Indian boundary line being made at different times and with reference to that line, is the correct one, the line running from the half-mile post on the south section line to the Indian boundary line, and the one from the north half-mile post south to the Indian boundary line, would not meet at that point so as to form a straight line through the section.

This is admitted by the appellant's counsel in his brief.

An examination of the plat shows that this line is a straight one throughout.

The plat also shows, when the different lots lying east of this line are added together and compared with a like addition of the lots west of it, that the excess of land in the south half of the section was thrown into the west half of the half section.

We conclude from this that the surveyor general, or some

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one by his authority, corrected the error of the deputy surveyor, and established the half-section corner at a point forty chains west of the southeast corner of the section, and that it was so platted and returned to the department charged with the sale of the public lands. *Doe v. Hildreth, supra.*

Some objections to the giving in evidence of certain surveys, made by county surveyors, without notice to the land-owners adjoining, are discussed in the briefs of counsel.

We have not examined these causes for a new trial, and think it unnecessary to do so, for the reason that giving to the plat of the original survey the importance as evidence that we do, the plaintiff failed to make a case on his own showing, and was therefore not injured by the evidence objected to, even if his objections were well taken.

Judgment affirmed.

Filed March 18, 1892.

No. 15,487.

**THE INDIANAPOLIS, DECATUR AND WESTERN RAILWAY
COMPANY v. HOOD ET AL.**

HIGHWAY.—*Proceedings to Establish.*—*Remonstrance.*—*Negligence of Appellant's Attorney.*—*Appeal.*—In a highway proceeding, objections must be appropriately presented to the board of commissioners or they can not be made available in the circuit court on appeal. It is no excuse for appellant's failure to file a remonstrance before the board that his attorney was negligent, as the negligence of the attorney is the negligence of the client.

From the Vermillion Circuit Court.

R. B. F. Peirce, for appellant.

H. H. Conley and *J. C. Sawyer*, for appellees.

ELLIOTT, C. J.—Proceedings for laying out a highway were prosecuted before the board of commissioners of Vermillion county. The appellant did not appear, but, after the decision of the board in favor of the petitioners, appealed

130	594
146	289
130	594
151	73
130	594
158	326
130	594
163	235
130	594
169	402

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the case to the circuit court. In that court it offered to file a remonstrance, but the court denied its request. In support of its offer an affidavit was filed. The appellees insist that the affidavit shows no excuse for the failure to file the remonstrance before the board of commissioners. The affidavit states that a former attempt to open the highway was prevented by an order from the Federal Court, the railroad corporation at that time being in the hands of the counsel, who here represents it as a receiver; that he then prepared to resist a second attempt to open the highway. We quote from the affidavit the following: "And the affiant says that after the filing of the petition herein he prepared, on the part of said railway company, to resist this second attempt to open said highway, and he arranged with Robert B. Sears, a member of the bar of this court, to file a remonstrance and a claim for damages before the board of commissioners, and said Sears assured this affiant that he would do so; that when the matter came before the board for action affiant was engaged elsewhere, and could not be present, and so notified said Sears, but relied upon said Sears, as attorney for the company, to file the remonstrance and claim for damages, and affiant believed that he would do so, but before affiant was aware that said remonstrance and claim for damages had not been filed, the commissioners had acted finally upon said petition and adjourned; that as soon as he learned of said action he appealed this case to this court."

It is firmly settled that in cases of this character objections must be appropriately presented to the board of commissioners or they can not be made available in the circuit court on appeal. *Green v. Elliott*, 86 Ind. 53, and cases cited; *Wells v. Rhodes*, 114 Ind. 467; *Forsythe v. Kreuter*, 100 Ind. 27; *Lowe v. Ryan*, 94 Ind. 450; *Budd v. Reidelbach*, 128 Ind. 145, and cases cited. In *Metty v. Marsh*, 124 Ind. 18, it was said: "It has so often been adjudged by this court, in cases analogous to this, that no matter not put in issue before the board of commissioners can be tried on

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appeal to the circuit court, that but little can be said in elaboration of the principle." It is very evident that we can not hold that the trial court abused its discretion in refusing to permit an issue to be made on appeal, unless we declare that the affidavit of the appellant makes an extraordinarily strong case. This the decisions forbid us from doing. The affidavit simply shows that the attorney employed by the appellant was guilty of inexcusable negligence, and this is not sufficient to warrant us in overthrowing the ruling of the trial court. It has been steadily held that the negligence of the attorney is the negligence of the client. *Sharp v. Moffitt*, 94 Ind. 240, and authorities cited.

No attack upon the petition was made either in the circuit court or before the board of commissioners; it is, however, here alleged as error that "the petition is insufficient, for the reason that it does not contain a sufficient description of the proposed location of the highway." Waiving a consideration of the question whether the attack can be here made for the first time, we hold that the description is not so radically defective as to authorize a reversal of the decision of the commissioners. Whether the description would have been sufficient had it been appropriately and reasonably challenged is not the question, for the question is whether it is sufficient to repel an original attack in the court of last resort.

If it were granted that the circuit court pursued a wrong mode in dismissing the appeal instead of rendering judgment against the appellant, it would not follow that there was available error, for the appellant was not harmed. As it had no issue upon which it could have possibly succeeded, the mode in which the case was put out of court was not of controlling importance. We are inclined to think that the appellant did not pursue the proper course in appealing, and that the motion to dismiss was, for that reason, properly sustained, but it is unnecessary to decide that question.

Judgment affirmed.

Filed March 18, 1892.

Bennett et al. v. Acton, Guardian.

No. 14,763.

TUCKER, TREASURER, ET AL. v. O'NEAL.

From the Putnam Circuit Court.

J. J. Smiley, W. G. Neff and J. L. Myers, for appellants.

M. A. Moore and G. C. Moore, for appellee.

ELLIOTT, C. J.—Affirmed on the authority of *Tucker v. Sellers*, ante, p. 514.
Filed March 11, 1892.

No. 15,208.

EWING v. CARSON ET AL.

From the Vanderburgh Superior Court.

J. T. Walker, F. Ullman and R. E. Pendarvis, for appellant.

A. Gilchrist and C. A. De Bruler, for appellees.

MILLER, J.—The questions involved in this appeal are the same that were determined in *Ewing v. Jones*, ante, p. 247. For the reasons given in the opinion in that case the judgment of the court below is reversed.

Filed Jan. 28, 1892.

No. 16,346.

COOK ET AL. v. ARMSTRONG.

From the Howard Circuit Court.

M. Bell and W. C. Furdum, for appellants.

J. C. Blackledge, C. C. Shirley and B. C. Moon, for appellee.

OLDS, J.—The facts in this case are the same and the same question is presented as was presented in the case of *Cook v. Claybaugh*, ante, p. 133, and on the authority of the decision in that case this judgment is affirmed.

Filed Jan. 6, 1892.

No. 15,612.

BENNETT ET AL. v. ACTON, GUARDIAN.

From the Jackson Circuit Court.

W. K. Marshall, for appellants.

COFFEY, J.—This was an action by the appellee against the appellants to set aside certain alleged fraudulent conveyances. The only question involved in the case relates to the sufficiency of the evidence to sustain the finding of the court.

We have read the evidence in the cause, and think there is evidence, both direct and circumstantial, from which the court was authorized to find that the conveyances in question were made and accepted for the fraudulent purpose of defeating the collection of the appellee's claim. We can not, under the well known rules of this court, disturb the finding of the circuit court on the evidence.

Judgment affirmed.

Filed Feb. 25, 1892.

1306 597
181 361

Mellen v. The State.

No. 16,136.

CAMPBELL ET AL. v. BOARD OF COMMISSIONERS OF MONROE COUNTY.

From the Monroe Circuit Court.

J. R. East, W. H. East, R. W. Miers and E. Corr, for appellants.

J. H. Loudon and W. P. Rogers, for appellee.

OLDS, C. J.—There is no question presented for the decision of this court by the record in this case.

The record does not contain the complaint or any of the pleadings in the cause, nor is there even a statement of their contents or anything to show what the issues were or what remedy or relief was sought by the action. The record entitles the cause; then shows the appointment of a special judge to try the cause, and the oath taken by the special judge. Then follows what purports to be a special finding of facts made by the court at the request of the parties, and conclusions of law stated by the court. Neither the statement which purports to be a finding of facts nor the conclusions of law are signed by the judge, nor are they or either of them brought into the record by bill of exceptions. There is no bill of exceptions in the record. The record, therefore, contains nothing in the way of pleadings, special finding of facts or evidence. The judgment must be affirmed.

Judgment affirmed, with costs.

Filed May 16, 1891; petition for a rehearing overruled Feb. 6, 1892.

No. 16,335.

MELLEN v. THE STATE.

From the Perry Circuit Court.

W. A. Land, for appellant.

A. G. Smith, Attorney General, and *R. M. Johnson*, Prosecuting Attorney, for the State.

ELLIOTT, C. J.—The appellant asks a reversal of the judgment declaring him guilty of the crime of assault and battery with intent to kill, and rests his case upon the single proposition that the verdict is not sustained by the evidence. We have given the evidence a very careful study, and are satisfied that it supports the verdict. It was proved in the strongest and clearest way that the appellant was the aggressor; that he was armed for deadly encounter, and that he sought to provoke the man he shot into a combat. This makes the statement of the injured man that the appellant fired the first shot probable, and thus gave strong corroboration to his testimony. But the case does not stand upon the corroborating circumstance mentioned and the positive testimony of the injured man alone, for there is other evidence tending to prove the appellant guilty of the crime charged against him.

Judgment affirmed.

Filed Dec. 12, 1891.

Cook *et al.* v. Henderson.

No. 15,230.

DAUGHERTY ET AL. v. WHEELER.

From the Fulton Circuit Court.

E. Myers, G. W. Holman, R. C. Stephenson and M. R. Smith, for appellants.
S. Keith, for appellee.

McBRIDE, J.—This was a suit to recover the possession of land, to which the purchaser claimed title under a sheriff's sale. The sale was made under a judgment of the Fulton Circuit Court, which was rendered waiving relief from valuation and appraisement laws, and the judgment creditor was the purchaser.

On appeal to this court it was held that to the extent that the judgment was made collectible without valuation and appraisement laws, it was erroneous, and it was modified accordingly. *Daugherty v. Wheeler*, 125 Ind. 421.

The sale was made under the original judgment, without relief, and was to that extent unauthorized.

Judgment reversed.

Filed Feb. 17, 1892.

No. 15,515.

WOLF v. WOLF.

From the Vigo Circuit Court.

W. Eggleston and T. Haymond, for appellant.

ELLIOTT, C. J.—The question in this case is the same as that decided in *Haynes v. Nowlin*, 129 Ind. 581. We there decided, as we here decide, that a wife may maintain an action against one who wrongfully deprives her of the society, support and affections of her husband. To the authorities cited in our former opinion we add *Warren v. Warren* (Mich.), 50 N. W. R. 842, and *Waldron v. Waldron*, 45 Fed. R. 315.

Judgment reversed.

Filed Feb. 19, 1892.

No. 16,345.

COOK ET AL. v. HENDERSON.

From the Howard Circuit Court.

M. Bell and W. C. Purdum, for appellants.

J. C. Blackledge, C. C. Shirley and B. C. Moon, for appellee.

OLDS, J.—The facts in this case are the same, and the same legal question is presented, as is presented in the case of *Cook v. Claybaugh*, *ante*, p. 133, and on the authority of the decision in that case the judgment in this case is affirmed.

Filed Jan. 6, 1892.

Cowan v. Huffman et al.

No. 15,204.

EWING v. LEMCKE ET AL.

From the Vanderburgh Superior Court.

J. T. Walker, F. Ulman and R. E. Pendarvis, for appellant.

A. Gilchrist and C. A. De Bruler, for appellees.

ELLIOTT, C. J.—The judgment in this case is reversed for the reasons stated in the opinion given in the case of *Ewing v. Jones, ante*, p. 247.

Filed Jan. 28, 1892.

No. 15,202.

EWING v. TORIAN ET AL.

From the Vanderburgh Superior Court.

J. T. Walker, F. Ulman and R. E. Pendarvis, for appellant.

E. E. Iglehart and E. Taylor, for appellees.

MILLER, J.—The questions involved in this appeal are the same that were determined in *Ewing v. Jones, ante*, p. 247.

For the reasons given in the opinion in that case the judgment of the court below is reversed.

Filed Jan. 28, 1892.

No. 15,175.

COWAN v. HUFFMAN ET AL.

From the Kosciusko Circuit Court.

R. B. Ennell, J. S. Fraser and W. D. Fraser, for appellant.

E. Haymond, H. S. Biggs and L. W. Royce, for appellees.

MILLER, J.—The appellant assigns for error the sustaining of the appellees' demurrer to the amended complaint.

The appellees insist that we can not review the ruling on demurrer, for the reason that no exception was taken to the action of the court in sustaining the demurrer at the time it was made.

We have examined the record, and find that it recites the ruling of the court on the demurrer, and a refusal of the plaintiff to amend the complaint or plead further, and that thereupon the court rendered judgment on demurrer. Then follows a formal judgment that the plaintiff take nothing by the action, and that the defendants recover of the plaintiff their costs and charges in this case laid out and expended, "to which the plaintiff excepts."

The case of *State, ex rel., v. Weaver*, 123 Ind. 512, is directly in point, and upon the authority of that case we must affirm the judgment.

It is proper to say that the record in this cause was prepared under the supervision of an attorney other than the one who appears of record in this court.

Judgment affirmed.

OLDS, J., took no part in the decision of this case.

Filed Oct. 8, 1891; petition for a rehearing overruled Feb. 27, 1892.

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2. *Splitting Up.—Defendant Having Divided Fund Before Suit Brought*—If the plaintiff sue for a part of a fund when the whole is due, and recover a judgment for such part, he can not afterwards sue for the remainder; but if the defendant has divided the fund, and placed a part of it in the hands of a third person, such third person can not object that he is not liable on the ground that the plaintiff has recovered a judgment against the original defendant for the amount retained by him.

Indianapolis, etc., R. W. Co. v. Center Tp., 89

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4. *Same.—Parties Dividing Cause of Action.*—Parties having a common cause of action can not divide it up so as to enable each to bring a separate action upon it. *Ib.*

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1. *Objections and Exceptions to Evidence.*—The negative evidence afforded by one bill of exceptions that a given objection was not made and a given exception was not taken because not shown by that bill, is overcome by the affirmative evidence of the other that the objection was duly made and excepted to at the time. *Boulus v. State*, 227
2. *Delay of Judge in Signing.*—*Effect.*—If time is given for filing a bill of exceptions, and within that time a proper bill is prepared and presented to the judge, and the fact of presentation is shown by the recitals of the bill, delay of the judge in signing it will not prejudice the party presenting it; for it may be signed and filed after the expiration of the time allowed. *Wysor v. Johnson*, 270
3. *Same.*—*Presentation of Part of Bill Before and Part After Time Allowed.*—If part of a bill of exceptions is presented within the time allowed and part after that time, no part of the bill will be considered on appeal. *Ib.*
4. *Same.*—*Filing within Term Time.*—*No Time Given.*—If a bill of exceptions is signed and filed during the term at which the ruling it contains was made, it is a part of the record, although no time was given within which to file it. *Ib.*
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8. *Same.*—*Written Instruments, How Made Part of.*—Written instruments may be brought into a bill of exceptions by reference, but in order to bring them into the bill in that mode the instruments must appear to have been offered in evidence, they must be clearly identified by the judge, and the place for their insertion must be clearly indicated by the words "here insert." The judge can not delegate to the clerk, to the stenographer, or to any one else the authority to put a written instrument into a bill of exceptions. *Ib.*
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3. *Same.*—A party can not prevent the court's sending a cause to a particular county by showing in his affidavit for a change that the same causes are operating against him in such county as exist in the county where the suit was brought; such a statement is for the information of the court, serving to aid it in the exercise of its discretion. *Id.*
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3. *Same.*—*Motive of Legislators.*—In passing upon the constitutionality of a law the courts can not inquire into the motive of the legislators. *Ib.*
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3. *Dismissal.—When May be Made.*—Before jeopardy attaches a prosecution may be dismissed, although an indictment has been preferred. *Dye v. State, 87*
4. *Same.—Information.—When Prosecution May be by.*—After a *nolle prosequi* is entered and a prosecution ended, the accused may be prosecuted by information if the grand jury has been discharged and the court is in session. *Ib.*
5. *Same.—Conspiracy.—Proof of.—Co-Conspirators.*—A conspiracy can not be proved by the declarations of the alleged conspirator as against his co-conspirator. *Ib.*
6. *Same.—Declarations of Receiver as Against Thief.*—The declarations of a receiver of stolen goods are not admissible against the thief, unless it is first shown that a conspiracy existed between the former and the latter. *Ib.*
7. *Same.—Admissions of Receiver.*—If there be evidence showing a conspiracy, the admissions of the receiver made before the crime is committed are competent as against the thief; otherwise they are not. *Ib.*
8. *Information, Quashing of.*—The fact that an information does not allege that the court was in session when it was filed, and does not refer to the affidavit filed as the source of the prosecutor's information, is no ground for quashing the information under section 1759, R. S. 1891. *Blaker v. State, 203*
9. *Same.—Right of Jury to Determine the Law.—Instruction.*—In a prosecution for larceny of a horse, an instruction that "You * * * are the judges of the law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves. Notwithstanding you have the legal right to disagree with the court as to what the law is, still you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason,"—is a correct statement of the law.

10. *Same.—Possession of Stolen Horse.—Instructions.*—In such prosecution it is error to instruct that if defendant at one time had the horse in his possession, and afterward abandoned or left it, and does not account for or explain how he honestly came into possession of it, such facts, if proven beyond a reasonable doubt, raise the presumption that the defendant stole the horse; and that, in such case if defendant does not in some reasonable way explain his possession to the satisfaction of the jury, the presumption of guilt becomes conclusive. *Ib.*
11. *Assault and Battery with Intent to Kill.—Plea of Self-Defence.—Peaceable Character of Prosecuting Witness.—State may Show in Rebuttal.*—On a trial for assault and battery with intent to kill, where the defendant pleaded self-defence, and testified to facts of which he claimed to have personal knowledge tending to show that the prosecuting witness was quarrelsome and vicious, it was not error to permit the State to introduce in rebuttal evidence of the general character of the prosecuting witness for peaceableness. *Bowles v. State, 227*
12. *Subsequent Admissions of Accomplice.*—Declarations and admissions made by an accomplice, in the absence of the person on trial, long after the time when it is claimed that the crime for which such person is being tried was committed, are inadmissible. *Dean v. State, 237*
13. *Same.—Two Counts.—One for Larceny and One for Receiving Stolen Goods.—Declarations Improperly Received.—Error Cured by Verdict.*—But in such an instance, where the declarations relate to the receipt of the stolen goods, a verdict returned only on the count for larceny renders the error immaterial. *Ib.*
14. *Same.—Erroneous but Inconsequential Evidence.*—Erroneous but vague and inconsequential evidence, that does not probably injure a defendant, will not work a reversal of a case. *Ib.*
15. *Same.—Instructions Depriving Jury of Right to Pass on Credibility of Prosecuting Witness.*—An instruction that deprives a defendant of the right of the jury to consider, for what it is worth, evidence affecting the credibility of the prosecuting witness is erroneous. *Ib.*
16. *Same.—Felonious Taking.—Instruction Failing to State that in Larceny the Taking Must be so.—Failure to Distinguish Between Presumptions of Law and Fact.*—An instruction reciting what is sufficient to constitute a larceny, but omitting to inform the jury that the taking must have been felonious in order to constitute the transaction a larceny, and also failing to distinguish between presumption of fact and law, is erroneous. *Ib.*
17. *Same.—Defendant's Knowledge of Contents of Bundle Containing Money or of Felonious Taking.*—An instruction that if the defendant's wife took a bundle, containing money, alleged to have been stolen from a trunk in a room, and handed it out through a window to him and he took it, he would be guilty of larceny is erroneous, for not also containing a statement that he must have known, in order to convict him, of the contents of the bundle, or that the money was taken with a felonious intent. *Ib.*
18. *Instructions.—Directing Bailiff to Give.*—It is error for the trial court, in a criminal prosecution, to direct the bailiff to go into the jury room and give the jury instructions as to the return of their verdict. *Quinn v. State, 340*

19. *Same.—Reception of Verdict by Attorney.*—It is error to direct that the verdict should be received by an attorney, unless he is appointed a special judge. *Ib.*
20. *Indictment.—Conspiracy.—Value of Goods.*—An indictment for a conspiracy to commit a burglary is not defective for failing to state the kind or value of goods intended to be stolen. *Reinhold v. State, 467*
21. *Same.—Conspiracy.—Acquaintanceship of Conspirators.*—On a charge of conspiring to commit a burglary or other crime the acquaintance of the conspirators with each other may be shown. *Ib.*
22. *Same.—Defendant's Knowledge of Property in House to be Burglarized.*—On such a charge it may be shown that valuable property was kept in the house or place to be burglarized without first showing that the accused knew of it. *Ib.*
23. *Same.—Evidence Showing Endeavor of Accused to Meet Fellow-Conspirators.*—Evidence tending to show, in connection with other evidence already given, that the accused was endeavoring to meet his fellow-conspirators is admissible. *Ib.*
24. *Same.—Answer Not in Record.*—An erroneous question to which no answer appears in the record is not such an error as will reverse the case. *Ib.*
25. *Same.—Conspiracy, Remark of Judge that it Had Been Shown.—Curing Error.*—A remark of the judge, on the trial of a conspiracy to commit a crime, that in his opinion sufficient evidence had been introduced to show the conspiracy charged, and, upon the theory that a third person was one of the conspirators, his declarations in furtherance of the conspiracy and carrying out the unlawful design are admissible, is erroneous; but the court may cure the error in its general charge to the jury by stating to them to disregard the opinion of the court. *Ib.*
26. *Same.—Casual Remark of Court.—Withdrawing.*—A casual remark made by the court in the presence of the jury may be withdrawn just as an erroneous instruction, and the error, if any, will be cured. *Ib.*

DAMAGES.

See HIGHWAY, 10, 13, 15; INJUNCTION, 1; PRACTICE, 12, 13.

Pleading Must Show.—In a complaint to recover damages to land, the value of the land before and after the injury, or the amount of the damages, must be stated. *Morgan v. Lake Shore, etc., R. W. Co., 101*

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCE.

DECLARATIONS AND ADMISSIONS.

See CRIMINAL LAW, 6, 7, 12, 13.

DECREE.

See PARTITION, 2, 3.

DEDICATION.

See HIGHWAY, 1 to 3.

DEED.

See MORTGAGE, 3; TRUST.

1. *Consideration.—Recital in as Evidence of.*—A recital in a deed of the amount of the consideration is *prima facie* evidence of the payment of such consideration. *McConnell v. Citizens' State Bank, etc., 187*

2. *Construction.—Rule in Shelley's Case.*—A deed which "conveys and warrants" certain real estate to the grantee, "and to the heirs of her body," falls within the rule in *Shelley's Case*, and vests in such grantee an absolute fee. *Lane v. Uts, 235*

DEMURRER.

Special.—Special demurrers are not allowed by the civil code, and can not be resorted to. *Johnson v. Brown, 534*

DESCENTS.

1. *Widow Inheriting Land from Her Husband.—Marrying Second Husband.—Divorce Procured by Collusion.—Land Conveyed to Third Person.—Loan Procured on to Pay Second Husband's Debts.—Reconveyance.—Validity of Mortgage.*—A widow, by virtue of her marital rights, received a certain tract of land from her husband, and married. In order to procure money to pay off her second husband's debts, she entered into an agreement with him and his brother to the effect that she would obtain a divorce from her husband, then convey her land to his brother, the latter to procure a loan and mortgage the land to secure its payment, turn the money over to her husband, who was to assume the debt, he and she remarry, and the brother then reconvey the land to her. All this was done. Then she borrowed money of the appellee, who knew of the transactions narrated, and, with her husband, gave to the appellee the mortgage in controversy.
Held, that she took the land by purchase when it was reconveyed to her, and that the mortgage was valid.
Cook v. Claybaugh, 133; Cook v. Armstrong, 697; Cook v. Henderson, 699
2. *Second and Childless Wife.—Partition, Effect on Widow's Title.—Burden to Show Widow Had Greater Interest than Fee for Her Life.*—After her husband's death, in a partition proceeding between his second and childless wife and his children by his first wife, there was a finding that husband and father died seized in fee of certain real estate, leaving surviving him the widow and children, reciting that the widow was "entitled to an undivided one-third part of said real estate in fee simple as such widow," the children entitled to the remaining two-thirds, followed by the appointment of commissioners in partition, and a direction that they "assign and set apart to" the widow "a one third part, in value, of said real estate, to have and to hold to her and her heirs forever." On the death of the widow, in a suit to quiet title, her heirs claimed an interest in fee simple to the land awarded her by the commissioners, by force of the terms of the decree. Only the decree of partition was introduced in evidence, the papers having been lost, and no parol proof made of their contents.
Held, that the decree in partition gave the widow an interest only for her life, and that her heirs had no interest in the land.
Held, also, that the burden was on her heirs, the defendants, to show that she had a greater interest in the land than an interest for her life as against the heirs of her husband. *Reagan v. Sheets, 186*
3. *Widow During Second Marriage Conveying to Her Child with Assent of Her Remaining Children.*—A widow who marries a second time may, during such marriage, convey real estate, which she holds by virtue of her former marriage, to one of her children by her first marriage, if her other children by such marriage join in the deed of conveyance. *Fugate v. Payne, 231*

DESCRIPTION OF LAND.

See DRAINAGE, 3.

DILIGENCE.

See NEW TRIAL, 2.

DISCLAIMER.

See COSTS, 2.

DISCRETION.

See CHANGE OF VENUE, 5.

DIVORCE.

Agreement to Procure.—Validity of Divorce so Procured.—A divorce procured by agreement between the parties is *prima facie* valid.

Cook v. Claybaugh, 133; Cook v. Armstrong, 597; Cook v. Henderson, 599

DRAINAGE.

1. *Ditch Assessment.—Collateral Attack.—Infancy of Land-Owner.*—An assessment on land owned by minors in aid of the construction of a public ditch is not void because no guardian *ad litem* was appointed to answer for such minors in the proceedings for the construction of the ditch, but is merely erroneous, and can not be collaterally attacked.

McBride v. State, etc., 585

2. *Same.—Time of Referring Petition to Drainage Commissioner.*—The fact that ten days did not intervene between the time the proceedings were docketed and the time at which the court referred the petition to the drainage commissioner, did not render the assessment void. *Ib.*

3. *Description of Land.—Notice.—Legislature May Determine.*—It is competent for the Legislature to provide how lands may be described in a petition for a drain, and what notice must be given.

Killian v. Andrews, 579

4. *Same.—Personal Liability of Land-Owner.*—The owner of land which is assessed with benefits in the construction of a ditch is not personally liable for such assessment. *Ib.*

5. *Same.—Prior Mortgage Lien.*—The lien of a drainage assessment is subordinate to the lien of a pre-existing mortgage. *Ib.*

6. *Same.—Estoppel.*—The holder of a mortgage, which is a prior lien to the drainage assessment, by silently standing by and permitting the drain to be constructed, is not estopped to assert that his lien is prior to the lien of the assessment. *Ib.*

7. *Remonstrance.—Signed by Two-Thirds of Land-Owners.—Who May be Counted.*—Certain persons petitioned the board of county commissioners for the establishment of a ditch, describing the lands and giving the names of the owners thereof that would be affected thereby. After proper notice the petition was referred to three commissioners, who included in their report descriptions of lands and the names of the owners thereof not described and named in the petition. Certain of the land-owners, two-thirds in number of the entire number reported by the commissioners that would be affected by the proposed ditch, filed a remonstrance against its establishment, and the proceedings were dismissed.

Held, that the land-owners whose lands and names were described and inserted in the petition as lands and persons who would be benefited or damaged by said proposed ditch, could not be counted in ascertaining whether two-thirds of the persons so benefited or damaged had signed said remonstrance. *Elliott's Supp., section 1186.*

Yancey v. Thompson, 585

EASEMENT.

See RAILROAD, 10.

EJECTMENT.

See RAILROAD, 3.

ELECTION.

See MARSHALLING ASSETS.

ELECTIONS.

1. *Held at Time not Authorized by Law.*—The election of an officer at a time not authorized by law (as a township trustee at the regular November election) is void. *Kimberlin v. State, ex rel., 120*
2. *Construction of Law by Election Officers.*—A construction of the election law accepted and acted upon by the officers of election, whose duty it is to administer the law, should not be ignored by the courts, unless it is palpably wrong. *Parvin v. Wimberg, 561*
3. *Same.—Power of Legislature Over.*—It is within the power of the Legislature to prescribe the manner of holding elections and the mode in which electors shall express their choice. *Ib.*
4. *Same.—Elector Must Vote in the Manner Prescribed by Law.*—If an elector does not choose to indicate his choice in the manner prescribed by law, he can not complain if his ballot is not counted. *Ib.*
5. *Same.—Australian System.—Stamping Ballot.*—An elector can not indicate his choice in any other manner than by stamping one of the squares of his ballot with the stamp; and he can not stamp his ballot elsewhere, and leave the election board to guess at his intention. *Ib.*
6. *Same.—Irregularities.—Directory Provision of Law Violated.*—Mere irregularities on the part of the election officers, or their omission to observe some merely directory provision of the law, will not vitiate an election. *Ib.*
7. *Same.—Directory and Mandatory Provisions.—What are.*—If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must so hold whether the particular act in question goes to the merits or affects the result of the election or not, for such a statute is mandatory, and the courts can not enter into the question of its policy. *Ib.*
8. *Same.—Mandatory when Merits of Election are Affected.—Directory when Merits not Affected.*—If a statute simply provides that certain things shall be done within a particular time, or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits. *Ib.*
9. *Same.—Departure from Mode of Holding Election, When Does not Invalidate.*—A departure from the mode of holding an election as prescribed by statute, which does not deprive legal voters of their right to vote, or permit illegal voters to participate in the election, or cast uncertainty on the result, does not affect the validity of the election. *Ib.*
10. *Same.—Clerk's Initials Indorsed on Wrong Corner of Ballot.*—The statute requiring election clerks to indorse their initials on the ballot is mandatory; but the requirement that they indorse their initials in a particular place is directory only; and a ballot indorsed at an improper place can not for that reason be rejected. *Ib.*
11. *Same.—Ballot Placed in Wrong Ballot-Box.*—The fact that the election officers place a ballot in the wrong ballot-box by mistake will not vitiate the ballot and authorize its rejection in making the count. *Ib.*

ELECTRICITY.

See JUDICIAL NOTICE.

EMINENT DOMAIN.

See ASSESSMENT OF DAMAGES; HIGHWAY; RAILROAD, 4 to 6, STATUTE OF LIMITATIONS, 3.

EQUITY.

Injunction.—Inadequate Remedy.—If there is an inadequate remedy at law equity will assume jurisdiction. *McAfee v. Reynolds, 33*

ESTOPPEL.

See DRAINAGE, 6.

EVIDENCE.

See BILL OF EXCEPTIONS, 1, 6, 8 to 11, 15; BOUNDARIES, 2; CRIMINAL LAW, 1, 2, 6, 7, 14, 23; INSTRUCTIONS TO JURY, 2, 4; MALICIOUS PROSECUTION; PRACTICE, 4, 5, 20, 25, 26, 31, 34.

1. *Proof of Value of Land.—Opinion by Witness Unacquainted with Value of Land in that Vicinity.*—A witness, after stating the location of land and his knowledge of it, may give his opinion of its value, based upon such facts, without it being shown that he knew anything about the market value of lands in that vicinity.

Evansville, etc., R. R. Co. v. Fettig, 61

2. *Same.—Proof of Value both Before and After Construction of Railroad.*—In proving the value of land affected by the construction of a railroad, proof of its value, both before and after the construction of such road, may be made. *Ib.*

3. *Weight of Positive and Negative Testimony.—Instruction.*—It is not proper to instruct a jury they should give greater weight to a positive statement of a witness than to a negative statement of another witness.

Ohio, etc., R. W. Co. v. Buck, 300

4. *Objection to.—Part Competent.*—If part of the testimony of a witness is competent, a general objection to all of it may be overruled.

McGuffey v. McClain, 327

EXECUTION.

See MORTGAGE, 1, 2.

1. *Sale of Judgment.—Action to Set Aside.—Sufficiency of Complaint.*—In an action to set aside the sale of a judgment on execution, a complaint alleging that the plaintiff did not give up the judgment to be levied on is sufficient under section 724, R. S. 1881, which provides that choses in action may be levied upon when given up.

Steele v. McCarty, 547

2. *Same.—Sufficiency of Answer.*—An answer to such complaint, confessing that the plaintiff did not give up the judgment for levy and sale, and failing to allege any matter sufficient to avoid such confession, is bad on demurrer. *Ib.*

EXHIBIT.

See PLEADING, 8.

EXPERT AND OPINION EVIDENCE.

See HIGHWAY, 13 to 15.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 1 to 4.

FORECLOSURE.

See FRAUDULENT CONVEYANCE, 2; JUDGMENT, 19.

FORFEITURE.

See LIFE INSURANCE, 1.

FORMER ADJUDICATION.

See PLEADING, 4.

FRAUD.

See HUSBAND AND WIFE; JUDGMENT, 10, 12, 16; LIFE INSURANCE, 8; SHERIFF'S SALE, 13.

FRAUDULENT CONVEYANCE.

1. *Proof of Insufficiency of Debtor's Property to Pay His Debts.*—When a creditor of a grantor attacks his conveyance on the ground that it was fraudulent, he must aver and prove that when the conveyance was made, as well as when suit was brought, the debtor did not have enough property subject to execution to pay all his debts.
McConnell v. Citizens' State Bank, etc., 187
2. *Same.—Creditor Holding Mortgage Securing His Debt.—Security Insufficient.—Foreclosure Before Suit Brought to Set Aside Conveyance.*—A creditor holding a mortgage securing his debt on property insufficient to satisfy such debt is not bound to foreclose and sell such property before bringing his action to set aside his debtor's fraudulent conveyance.
Law v. Smith, 4 Ind. 56, and Baugh v. Boles, 35 Ind. 524, criticised. Ib.
3. *Setting Aside.—Special Finding.—Fraudulent Intent.*—In an action to set aside a conveyance as fraudulent, where there is a special finding, a fraudulent intent must be found as a fact, otherwise the conveyance can not be held to be fraudulent as to creditors.
Sickman v. Wilhelm, 480
4. *Aiding Grantor to Recover.—Heir.—Wife.*—As between the parties a court of equity will never interfere at the instance of a fraudulent grantor, who executes a conveyance to cheat his creditors, to aid him in the recovery of his property; and the heirs of a fraudulent grantor can no more question the validity of the conveyance than he can himself, but his wife can, although she join in the deed, if she had no knowledge of the intended fraud.
Kitts v. Wilson, 498

FRAUDULENT REPRESENTATIONS.

See SUBROGATION, 1.

GRAVEL ROADS.

See COUNTY COMMISSIONERS, 6.

1. *Collateral Attack on Decision of Board of County Commissioners.*—The decision of a board of county commissioners that a petition for a free gravel road is sufficient, and that it is signed by the proper number of freeholders, is conclusive as against a collateral attack.
Tucker v. Sellers, 514; Tucker v. O'Neal, 597
2. *Same.—Extent of Power of County Board.*—A board of county commissioners have not only power to order free gravel roads to be constructed, but also to order bonds to be awarded for its construction. *Ib.*
3. *Same.—Notice of Assessment.*—The board has no authority to order the making of an assessment, or second assessment, without first giving notice thereof. *Ib.*
4. *Same.—Assessment.—When Effective.—Approved.*—The assessment for a free gravel road does not become effective until approved by the board of county commissioners. *Ib.*
5. *Same.—Injunction.—Bringing Suit Before Assessment Under Defective Notice.*—If a suit is brought to enjoin an assessment about to be made

under a defective notice, an answer setting up such notice and an assessment made subsequently to the commencement of such suit, is insufficient. *Ib.*

GUARANTY.

Notice of Acceptance.—When Necessary.—It is not necessary that a guarantor should be notified of the acceptance of a contract of absolute guaranty when such contract is contemporaneous with or subsequent to the principal contract and which guaranty contract is not a mere proposition to become responsible in case credit is extended, or a contract is thereafter to be entered into on the faith of such guaranty contract. *Bechtold v. Lyon, 194*

HARMLESS ERROR.

See CRIMINAL LAW, 14, 24 to 26.

HIGHWAY.

1. *Dedication, Revocation.*—A valid dedication can not be revoked. *City of Noblesville v. Lake Erie, etc., R. R. Co., 1*
2. *Same.—Invalid Condition Annexed to Dedication, Effect.*—A donor can not attach to his dedication any condition that will destroy its chief characteristic or take it from the control of the public authorities; and if such a condition be attached, it is void and the dedication valid. *Ib.*
3. *Same.—Dedication Conditioned that a Railroad Might be Laid in the Street Dedicated.*—The use of a street for a railroad is a public use, and is not necessarily destructive of the character of the public way; and a condition annexed to a dedication that a railroad company should have the right to lay a track or tracks in the street dedicated is not void. *Ib.*
4. *Collateral Attack on Proceedings.—Presumption.*—In a collateral attack on a highway proceeding, the presumption is that such proceeding is not void. *Ryder v. Horsting, 104*
5. *Same.—Notice of Establishment.*—The establishment of a highway without notice to the land-owner affected, his agent or occupant, is void. *Ib.*
6. *Same.—Injunction.*—A complaint to enjoin the opening of a highway through the plaintiff's land for want of notice must contain an averment that neither he nor his agent nor the occupant thereof had such notice. *Ib.*
7. *Collateral Attack on Order Establishing.*—A collateral attack on an order of a board of county commissioners establishing a highway can only succeed when such order is void; and if it is simply irregular or erroneous, the remedy is by appeal to the circuit court. *Rassier v. Grimmer, 219*
8. *Same.—Jurisdiction of Board of County Commissioners.*—The board of county commissioners has jurisdiction of all highways of its county outside of incorporated towns and cities. *Ib.*
9. *Same.—Establishment of.—Compensation to Land-Owner.*—While under the Constitution no one's land can be taken for the establishment of a highway without compensation, such compensation need not be made in money. Benefits accruing to the land from the establishment of the highway may constitute full and just compensation within the meaning of the Constitution. *Ib.*
10. *Damages Reduced by Benefits Received by Opening.*—In estimating the damages which a land-owner will sustain by reason of establishing a highway over his land, the benefit he will receive must also be considered. *Hire v. Kniseley, 296*

11. *Same.—Pay for Fences Already Erected.*—If the proposed highway will not require any additional fences, but will only require those already constructed to be removed, the land owner is not entitled to pay for such fences, but only for the cost of removing them. *Ib.*
12. *Same.—Appropriation of Fences.*—There can be no appropriation of fences in the way of a proposed highway. *Ib.*
13. *Same.—Damages.—Opinions of Witnesses.*—The opinions of witnesses tending to prove the market value of land, through which a proposed highway will run, without such highway, and its market value with the highway established and opened, may be given in evidence. *Ib.*
14. *Same.—Opinion.*—*What is not*—A question whether or not the opening of the highway will be a convenience to the land of the person asking damages, and to persons residing on it, so far as travel in a certain direction is concerned, does not call for an opinion, but for a fact. *Ib.*
15. *Same.—Opinion of Witness Whether Highway Would Affect Market Value of Land of Person Asking Damages.*—When a witness has testified that he is acquainted with the market value of land in the neighborhood of the proposed highway, and that such highway would affect the market value of the land over which it was to be located and opened, he may then give his opinion whether or not it would affect the market value of the land of the person asking damages. *Ib.*
16. *Order Establishing.—How Road Supervisor May Justify Under.—Jurisdiction.*—A road supervisor may justify under an order of the commissioners' court establishing a highway by showing that the board had jurisdiction of the subject-matter and of the parties, and that the order was such as might lawfully be made by it in a case of that character, and it is not necessary to set out all the facts connected with the making of the order. *Chicago, etc., R. W. Co. v. Sutton, 405*
17. *Same.—County Commissioners.—Jurisdiction.*—Boards of county commissioners have original and exclusive jurisdiction of the location and establishment of all highways not within the limits of municipal corporations. *Ib.*
18. *Same.—Jurisdiction of Parties.—Notice.*—Jurisdiction of the parties in the matter of establishing a highway outside the limits of a municipal corporation is obtained by posting notices as prescribed by section 5015, R. S. 1881. *Ib.*
19. *Same.*—Where the jurisdiction of the commissioners' court is shown, the same presumption of regularity attends all its proceedings that attaches to the proceedings of a court of general jurisdiction. *Ib.*
20. *Same.—Petition and Notice.—Sufficiency of Collateral Attack.*—Where a board of county commissioners assumes jurisdiction of the establishment of a public highway, it impliedly affirms the sufficiency of the petition and notice, and its decision can not be collaterally attacked. *Ib.*
21. *Same.—Highway of Lawful Width.—Presumption.*—Section 5028, R. S. 1881, provides that "No county road shall be less than thirty feet wide, and no township road shall be less than twenty five feet wide, and the order for laying out any highway shall specify the width thereof." An order of a commissioners' court established a highway forty feet wide up to the corporation line—twenty feet on each side of the section line being appropriated. From that point only twenty feet was appropriated for the highway by the board's order.
Held, in the absence of any averment to the contrary, that it will be presumed that the twenty feet so appropriated was to be in some manner supplemented by the appropriation of additional land within the corporation line, making a highway of lawful width. *Ib.*

22. *Proceedings to Establish.—Remonstrance.—Negligence of Appellant's Attorney.—Appeal.*—In a highway proceeding, objections must be appropriately presented to the board of commissioners or they can not be made available in the circuit court on appeal. It is no excuse for appellant's failure to file a remonstrance before the board that his attorney was negligent, as the negligence of the attorney is the negligence of the client. *Indianapolis, etc., R. W. Co. v. Hood, 594*

HUSBAND AND WIFE.

See TAXES, 1, 2.

- Antenuptial Contract Procured by the Husband's Fraud.—Setting Aside.—Husband's Subsequent Conduct.*—An antenuptial agreement which the intended husband by fraud and misrepresentations procures from his intended wife may be set aside at her instance before the marriage is dissolved or he dies; and his misconduct after marriage toward her may be shown for the purpose of showing that her act in bringing the suit was not premature. *Lamb v. Lamb, 273*

INDICTMENT.

See CRIMINAL LAW, 20.

INFORMATION.

See CRIMINAL LAW, 4, 8; QUO WARRANTO.

INJUNCTION.

See GRAVEL ROADS, 5; HIGHWAY, 6; JUDGMENT, 12; PRACTICE, 13.

1. *Right of Way, Obstruction of.—Damages.*—Where a right of way has been claimed and used for over twenty years, without interruption or dispute, it can not be closed against the person acquiring such right by prescription. An action for damages would not afford adequate relief, and injunction is the proper remedy to prevent an obstruction of it. *Sheeks v. Erwin, 31*
2. *Mandatory.—When May Issue.*—If there be an unlawful invasion of the plaintiff's rights, irreparable and continuing in its nature, the court may issue a mandatory injunction on final hearing, and it may do so in extreme cases in the first instance. *Brauns v. Glesige, 167*
3. *Same.—Apartment House.—Sale of Part.—Removal of Water-Pipe in Joint Service.*—If the owner of a double apartment house, which is served by a single water pipe for domestic purposes in both parts of the house, sell or lease one-half of the house, such water-pipe being appurtenant thereto and essential to the enjoyment of the half sold, he may be restrained from afterwards removing such pipe, and be compelled to restore it. *Ib.*
4. *Verification of Complaint.—When not Required.*—Where the only relief prayed for is an injunction upon the final hearing, a verification of the complaint is not required. Where the appeal is from the final judgment, and not from an interlocutory order granting a temporary injunction, it is wholly immaterial whether the complaint was verified or not. *Champ v. Kendrick, 549*
5. *Same.—Will.—Devise of Lands.—Sale of Lands by Devisee without Right.—Trustee May Enjoin Purchaser.*—Certain lands were devised to a party for and during his natural life, upon the express condition that the devisee should not sell or dispose of his interest in the lands by a sale in gross, or hold and enjoy the same in any other manner than by renting out the same from year to year and receiving the rents. The will also provided that after closing up the trust and making settlement with the court, the executor should not be finally discharged,

but should act as trustee upon the failure of the devisee to keep the taxes upon the lands devised to him fully and promptly paid, or if he should attempt to sell the same in gross.

Held, that the trustee might maintain an action to restrain the defendant to whom it was alleged the devisee sold said lands in gross from taking possession of the same, the insolvency of said defendant being alleged, and it being shown that the lands had been sold for taxes, and that they had not been redeemed from the sale, and that the trustee had in his hands no means of said trust with which to pay the taxes, and no way of acquiring such means except by renting out the lands as provided in said will. *Ib.*

INSANITY.

See LIFE INSURANCE, 2.

1. *Proceeding to Establish.—Circuit Court Has Exclusive Jurisdiction.*—The circuit court has exclusive jurisdiction in a proceeding under the statute to have a person adjudged of unsound mind, and incapable of managing her estate, and for the appointment of a guardian of her person and estate. *Martin v. Molsinger, 555*
2. *Same.—Notice to Party Unnecessary.—Must be Appearance for.—What Constitutes a Valid Appearance.—Prosecuting Attorney.*—In such a proceeding the statute does not, in terms, require notice to the party alleged to be of unsound mind, and the proceeding may be regular and valid without the service of any notice upon the party. The proceeding, however, is of such a character that it can not be *ex parte* and be valid. The prosecuting attorney is not authorized by our statutes to represent the party whose soundness of mind is questioned. An appearance by attorney, however, is sufficient, it not being claimed that such appearance was unauthorized. The party can not claim that she was incompetent to employ counsel, because her standing on appeal depends upon the assertion of her mental capacity and ability to transact business. Even if their appearance for her in the circuit court had been unauthorized, it would be binding upon her until set aside. *Ib.*

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 9, 10, 15 to 18; EVIDENCE, 3.

1. *Refusal.—Record Must Show no Other Instruction Given on the Subject.*—In order to show error committed in refusing an instruction, the record must show that no other instruction was given on the subject of the one requested. *Ohio, etc., R. W. Co. v. Buck, 300*
2. *Evidence not in Record.—Rule as to those Given.*—If the evidence is not in the record, the Supreme Court will not reverse the judgment on instructions given, unless they are so radically wrong that they could not be correct as applied to any supposed case which might have been made under the issues. *Hilker v. Kelley, 356*
3. *Presumption as to Instructions Refused.—Instructions Not All in Record.*—If the record does not contain all the instructions given to the jury, it will be presumed that the instructions given, but omitted from the record, gave the substance of all proper instructions refused. *Reinhold v. State, 467*
4. *Same.—Evidence Not in Record.—Presumption.*—If the evidence is not in the record, every reasonable presumption will be indulged to uphold the instructions given. *Ib.*

INSURANCE.

1. *Meaning of "Damages" in Section 3753.*—The word "damages," as used in section 3753, R. S. 1881, means fire losses. *Clark v. Manufacturers', etc., Ins. Co., 338*

2. *Same.—Assessments.—When Can be Made.*—Under section 3753 assessments are only authorized for the payment of the just claims of members, founded on policies, and only to pay an excess of the claim over the remainder of the fund on hand after deducting expenses. *Ib.*
3. *Same.—Meaning of "Member" in Section 3753.*—The term "member" used in said section 3753 is synonymous with policy-holder, so far as it relates to the payment of fire losses. *Ib.*
4. *Same.—Two Classes of Policy-Holders.—Equality of.*—The fire losses of both the paid up policy-holders and those of the purely mutual plan stand on the same footing. *Ib.*
5. *Same.—Cancellation.—Right to Make Contract for.*—An insurance company may make a contract for the right to cancel a policy on certain conditions, and providing for the refunding of unearned premiums paid. *Ib.*
6. *Same.—Unearned Premiums.—Preference of Paid up Policy-Holders Over Unpaid.*—Paid up policy-holders in a mutual fire insurance company, organized under the laws of this State, for which a receiver has been appointed, and whose policies have been cancelled under an order of the court, are entitled to have their unearned premiums paid, after the payment of the expenses of the company, out of any money remaining on hand, in preference to the claims of members for fire losses, who must resort to the fund to be created by the payment of premium notes. *Ib.*

INTENT.

See FRAUDULENT CONVEYANCE, 3.

INTEREST.

See ADVANCEMENT.

1. *Payments.—How Applied.*—If a payment made by a debtor is not applied to the liquidation of any part of the indebtedness by the debtor or creditor, the law applies it; and if such indebtedness consists of a principal sum and interest, the law applies the payment first to satisfy the interest and the remainder to the principal.
Jacobs v. Ballenger, 231
2. *Same.—Option of Maker of Note to Pay in Whole or Part Before Due.—Method of Calculating Interest.*—If a note drawing interest is payable in whole or part before due, at the option of the maker, the interest on each payment up to the time it was made should be cast up, and the payment applied first to the reduction of the interest and then to the reduction of the principal. *Ib.*

INTERROGATORIES TO JURY.

1. *When Control General Verdict.*—A general verdict can be overturned by the special findings of the jury only when such verdict and findings can not be reconciled with each other under any supposable state of facts provable under the issues. *Louisville, etc., R. W. Co. v. Creek, 139*
2. *Same.—Presumption in Favor of General Verdict.*—The court will not presume anything in aid of the special findings of a jury, but will make every reasonable presumption in favor of the general verdict. *Ib.*
3. *Same.—Motion.—Sufficiency of.*—Motion as follows: "The defendant files motion for judgment on answers to interrogatories notwithstanding the general verdict for plaintiff."
Held sufficient, though deemed very informal. *Ib.*
4. *Presumption of Submission to Jury.*—If the record shows a request for answers to interrogatories in case a general verdict be returned, and a general verdict and interrogatories with answers be returned, it

will be presumed that the court submitted such interrogatories to the jury. *Shoner v. Pennsylvania Co.*, 170

INTERSTATE COMMERCE.

See MUNICIPAL CORPORATION, 3.

JAIL.

See COUNTY.

JUDGMENT.

See ABATEMENT; APPEAL, 3, 4; COUNTY COMMISSIONERS, 7; JUSTICE OF THE PEACE.

1. *Arrest of.*—The fact that the number on the indictment and the number of the cause are different is not sufficient to authorize the arrest of the judgment, if the record show that all the proceedings subsequent to the return made by the grand jury were had on the indictment thus returned. *Vanlyne v. State*, 26
2. *Lien.—Right to Maintain Action to Assert Superiority of.*—The owner of a judgment which is a lien upon real estate may bring an action to have his lien declared prior to and free from a claim asserted to be superior to it. *McAfee v. Reynolds*, 33
3. *Same.—Lien.—How Given.—Extending.*—The lien of a judgment is given by statute, and can not be prolonged by the court beyond the time fixed by the statute. *Ib.*
4. *Same.—Action to Enforce Lien of.—Expiration of Lien Pending Suit, Effect.—Costs.*—A judgment lien can not be enforced against an inferior lien after the former has expired, although the action for that purpose was brought on such judgment before it expired, such lien having expired during the pendency of the suit. In such an instance the plaintiff is entitled to recover costs up to the time of the decision of the court. *Ib.*
5. *Judgment Filed in Other County.—Duration of Lien.*—The lien of a judgment of a circuit court, filed in a county other than the one in which it was rendered, expires at the same time the lien expires in the county in which such judgment was rendered. *Bradfield v. Newby*, 59
6. *Effect of on Parties.—Reservation of Right to Litigate.—Agreement that all Defences May be Considered Under General Denial.*—A judgment is binding upon the parties as to all matters litigated; but if such judgment contains a special reservation as to a particular part of the subject-matter of the litigation, providing that it shall not operate and be binding upon the parties as to such part, it does not conclude the parties as to such part, even though it was agreed on the trial that all defences might be given under the general denial. *Indianapolis, etc., R. W. Co. v. Center Tp.*, 89
7. *Same.—Res Judicata.—How Determined.*—In determining whether a matter has been adjudicated, the court will examine the pleadings and the judgment rendered thereon. *Ib.*
8. *Payment by One of Two Joint Principals.*—One of two, or more, joint principals can not pay off the judgment against them and take an assignment thereof to himself. *Frank v. Traylor*, 145
9. *Objection to Form of Judgment.—Waiver of.*—Where no motion to modify the judgment, or objection to its form is made in the court below, objections made to the form of the judgment in the Supreme Court will not be considered. *Midland R. W. Co. v. Dickason*, 164
10. *Fraud.—Joint Tort Feasors, Recovery Against One on Fraudulent Contract, Effect on Prosecution Against the Other.*—Where two persons have con-

spired to enable one of them to procure a loan upon a worthless security, the recovery of a judgment on contract against the one so procuring the loan is no bar to an action against the other for damages sustained by reason of his participation in the fraud.

Union Central, etc., Ins. Co. v. Schidler, 214

11. *Same.—When Cause of Action Arises.*—As soon as the fraud is committed, in such an instance, a cause of action arises. *Ib.*
12. *Enjoining.—Laches.—Relief Available in Original Action.—Mistake, Fraud or Accident.*—A court of equity will not enjoin the enforcement of a judgment claimed to have been obtained by fraud, mistake or accident, unless the complaint shows, in addition to the fraud, accident or mistake relied upon, that it could not have been prevented by the use of reasonable diligence on the part of the plaintiff, that he has been diligent in seeking relief, and that the law afforded him no efficient remedy for the maintenance of his defence in the action in which such judgment was rendered. *Ratliff v. Stretch, 282*
13. *Purchaser of Encumbered land Paying.—Preserving Lien of.*—Where a purchaser of land pays off a judgment for which he is not liable, with a manifested intention to keep the lien alive, equity will preserve it for his protection and for equitable purposes. *Boos v. Morgan, 305*
14. *Same.—Merger of Lien.*—Where the owner of land purchases a judgment which is a lien on the land, and takes an assignment of it, the lien is merged in the fee. *Ib.*
15. *Same.—Purchaser of Property from Defendant Paying off Judgment.—Keeping Lien Alive.*—The doctrine of merger will not be applied as against a party not liable for a debt who pays it off to protect property acquired from the person primarily liable. *Ib.*
16. *Same.—Merger.—Fraud.*—Merger is never prevented when fraud or wrong would result if it were defeated. *Ib.*
17. *Same.—Levy.—Satisfaction.*—A levy is a satisfaction of the judgment to the extent of the value of the property levied upon. *Ib.*
18. *Greater Relief Granted than Party is Entitled to.—Waiver.*—Where a party is entitled to a judgment in his favor, but is granted greater relief than he is entitled to under the evidence, the judgment will not be disturbed in the absence of a motion to modify it. *Wood v. State, ex rel., 364*
19. *Default.—Foreclosure of Mortgage.—Purchaser of Tax Title.—Beneficiaries of Purchaser.—How Affected by.—Decree of Foreclosure.—Quieting Title.*—A suit was instituted to foreclose a mortgage, and a party was made defendant to the suit who held a lien against the mortgaged premises which was junior and subject to the mortgage. After he was served with process, and during the pendency of the foreclosure proceeding he purchased the mortgaged property at a tax sale, taking the certificate of purchase in his own name. The purchase was in fact made with the money of third parties and for their use and benefit, but without any fraudulent intent between the purchaser and the beneficiaries. A judgment by default was entered against said defendant in the foreclosure proceeding.
Held, that if said defendant had purchased the tax title in his own right, the lien would have been barred by the decree of foreclosure.
Held, also, that the beneficiaries of such purchaser do not occupy any better position than the original purchaser.
Held, also, that it was not necessary that the purchaser of the tax title should have been sued as a trustee in order to bind the beneficiaries, there being nothing to indicate that such a relation existed.

Held, also, that the appellee, or the mortgagees under whom he claims title, was not required to pay or to offer to pay the taxes on the land for which it was sold, in order to have the title to the land quieted.

Davis v. Barton, 399

20. *Tort.—Splitting up Action.—Res Judicata.*—An entire claim arising from a single tort can not be divided and made the subject of several suits, however numerous the items of damages may be; and a judgment upon any part of such a cause of action is a bar in other actions arising out of the same tort.

Roby v. Eggers, 415

21. *Same.—Prosecuting Suit in Another's Name.—Effect.*—One who prosecutes a suit in the name of another to establish a right of his own is as much bound by the result of such suit as he would be if he were a party to the record.

Ib.

22. *Review of.—Appeal Prayed in Original Case.—Jurisdiction.*—The fact that an appeal was prayed, but not perfected, does not prevent the lower court from reviewing its judgment.

State, ex rel., v. Kolsen, 434

JUDICIAL NOTICE.

Electricity.—The courts take judicial notice of electricity and of its properties, but not of the several methods of generating, transmitting or using it.

City of Crawfordville v. Braden, 149

JUDICIAL SALE.

See SHERIFF'S SALE.

JURISDICTION.

See APPEAL, 1, 4; APPELLATE COURT; COUNTY COMMISSIONERS, 5, 7; HIGHWAY, 8, 16 to 19; INSANITY, 1.

1. *Injury to Land Lying in Another State.—Defendant Having Railroad Running Through this and such Other State.*—An action can not be maintained in this State for an injury to land lying in another State caused by a railway company having a line of railroad running through this and such other State.

Du Breuil v. Pennsylvania Co., 157

2. *Same.—Trespass to Real Estate.—Action Local.*—An action of trespass for an injury to real estate must be brought in the county where the real estate is situated.

Ib.

3. *No Right of Action.—Existence of.*—Jurisdiction is nothing more than judicial authority over a general subject, and may exist even though there be no right of action.

McGuffey v. McClain, 527

4. *Of Subject Matter.*—A court has jurisdiction of the subject-matter when it has jurisdiction of the class of cases to which the particular case belongs.

Chicago, etc., R. W. Co. v. Sutton, 406

5. *When Collateral Attack will not Lie.*—Where there is general jurisdiction of the subject, and the jurisdiction of the particular case depends upon the facts, the decision of the tribunal making it is conclusive against a collateral attack.

Tucker v. Sellers, 514; *Tucker v. O'Neal*, 597

6. *Same.—By Consent.*—Consent or acquiescence can not confer jurisdiction of the general subject; but jurisdiction of a particular instance falling within the scope of the general subject may be given by consent, either express or implied.

Ib.

7. *Same.—Notice Necessary.*—There can be no jurisdiction without notice.

Ib.

8. *Same.—Notice.—Sufficiency.*—If the notice given is sufficient to call into exercise the authority of the court and invoke its judgment upon the jurisdictional facts, the decision of the court that there was notice

can not be held void, and its judgment on that ground collaterally attacked. *Id.*

9. *Same.—Defective Notice.*—If there is a notice provided for by law, and notice is assumed to be given under the law, then there is jurisdiction, although the notice is defective *Id.*

JUSTICE OF THE PEACE.

Judgment.—Collateral Attack.—Title to Land Put in Issue by Affidavit.—Protection to Officer Enforcing Judgment by Process.—The decision of a justice of the peace, when it is sought to put the title of land in issue by affidavit, that the title is not in issue and that he has jurisdiction to hear and try the cause, is not subject to collateral attack, and a judgment rendered therein by him is a complete protection to the officer enforcing process issued on such judgment. *Alexander v. Gill, 485*

LABORER'S LIEN.

See RAILROAD, 7.

LACHES.

See ABATEMENT; BILL OF EXCEPTIONS, 14; JUDGMENT, 12.

LARCENY.

See CRIMINAL LAW, 10, 16, 17.

LAW OF CASE.

See PRACTICE, 1, 2.

LEVY.

See JUDGMENT, 17.

LIEN.

See JUDGMENT, 2 to 5, 13 to 15; SHERIFF'S SALE, 7 to 9; SURREGATION, 1 to 4.

LIFE-ESTATE.

See WILL, 2, 4.

LIFE INSURANCE.

1. *Suicide.—Forfeiture for.—Accidental Death.*—A condition in a policy of life insurance that it shall be void if the insured shall die by his own hand has no application where the insured kills himself by accident. *Michigan, etc., Ins. Co. v. Naugle, 79*
2. *Same.—Suicide.—Insanity.*—Such a condition does not apply if the insured takes his life while of unsound mind, if his mind is so impaired by disease that he does not comprehend the moral character of his act, though he may have sufficient mental capacity to know the physical consequences of the deed. *Id.*
3. *Same.—Compromise Procured by Fraud.*—Where a party has been induced by fraud to settle a claim on an insurance policy, and has surrendered the policy on the payment of the amount of the compromise, he may rescind such compromise and sue for the remainder due on the policy. *Id.*

LIGHT.

See MUNICIPAL CORPORATION, 6, 8, 9.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS, 3.

MALICE.

See MALICIOUS PROSECUTION, 1.

MALICIOUS PROSECUTION.

1. *Malice.—Evidence.—Ill Will Against Third Persons.*—In an action for malicious prosecution it is competent to prove the ill-will or malice of the defendant against the plaintiff, but it is not competent to prove that the defendant entertained malice against third persons.
Shanks v. Robinson, 479
2. *Same.*—Where it becomes necessary to show the intent, it is competent to prove the transactions between the immediate parties, and the nature of the controversy between them. *Ib.*

MARRIED WOMAN.

1. *Insane Husband.—Conveyance of Separate Property.*—By the act of March 11th, 1861 (1 R. S. 1876, p. 555), a married woman whose husband is insane may make a valid deed of conveyance of her separate property.
Teeter v. Newcom, 28
2. *Principal or Surety.—Ratification.*—If a husband procure a conveyance of land to be made to his wife, instead of to himself, without her knowledge, and she execute with him a note and mortgage to secure the payment of the purchase-money, the vendor supposing she is the purchaser, and afterwards she is informed of the fact that the conveyance was made to her, and she does not object to the transaction until suit is brought to foreclose such mortgage, her action will amount to a ratification of the transaction, and she is bound thereby.
Pattison v. Babcock, 474

MARSHALLING ASSETS.

Two Funds.—Election.—A person having two funds to satisfy his demands can not by an election disappoint another person who has only one fund to which he can resort. *Clark v. Manufacturers', etc., Ins. Co., 332*

MASTER AND SERVANT.

See NEGLIGENCE, 4, 6, 7, 10, 15.

1. *Fellow-Servants.—Engineer and Cleaner of Locomotive.*—A servant in charge of a locomotive in a yard, and another servant engaged in cleaning it, are fellow-servants. *Spencer v. Ohio, etc., R. W. Co., 181*
2. *Fellow-Servant.—Section Foreman.—Vice-Principal when.*—A section foreman of a railroad, with power to employ and discharge section hands, is a vice-principal when employing and discharging servants; but he is a fellow-servant in his control of the men after their employment; and for an injury to a member of his gang, occasioned by such foreman's negligence, the railroad company is not liable.
Justice v. Pennsylvania Co., 321
3. *Same.—Rank of Servant not Determinative.*—Whether or not two persons, at a given time, are fellow-servants is not a question of rank. *Ib.*
4. *Same.—When and where not a Fellow-Servant.*—If at the time the offending servant performs the act by which another servant is injured he is in the performance of a duty which the master owes to his servants, he is not a fellow-servant; but if the offending servant is in the discharge of a duty which he owes to the master, he is a fellow-servant with others engaged in the same common business. *Ib.*
5. *Same.—Delegation of Power.—Liability of Master.—Vice-Principal.*—A master can not rid himself of the duty he owes to his servants by delegating his authority to another; and if he attempts to do so, the person to whom he delegates the power to act is a vice-principal, and not a fellow-servant. *Ib.*

MERGER.

See JUDGMENT, 14, 16.

METROPOLITAN POLICE.

See CONSTITUTIONAL LAW, 1, 2.

MISCONDUCT OF COUNSEL.

See ARGUMENT OF COUNSEL.

MISTAKE.

See JUDGMENT, 12; NUNC PRO TUNC ENTRY, 7.

MORTGAGE.

See FRAUDULENT CONVEYANCE, 2.

1. *Execution Includes Delivery and Acceptance.*—The execution of a mortgage includes its delivery to and acceptance by the mortgagee.
John Shillito Co. v. McConnell, 41
2. *Same.—Recording as Evidence of Execution.*—The record of a mortgage is *prima facie* evidence of its prior execution, but it is not conclusive, and it may be shown that, although recorded on a certain date, it was not delivered until afterward.
Ib.
3. *When Deed may be a Mortgage.—Purchaser with Notice.*—An absolute conveyance, without any accompanying written defeasance, contract of repurchase, or other written agreement, may be shown by means of extrinsic and parol evidence to be in reality a mortgage, as between the parties to it and as against all those deriving title from or under the original grantee who are not *bona fide* purchasers for value and without notice.
Kitts v. Wilson, 492
4. *Same.—How Construed in Absence of Evidence.*—*Prima facie* such an instrument is an absolute deed; and a court will so recognize and treat it in the absence of affirmative evidence changing its apparent character.
Ib.

MUNICIPAL CORPORATIONS.

1. *Act for Incorporation of Cities—Right of Court to Decide Controversies Concerning Private Rights.*—The act for the incorporation of cities does not take from the courts authority to decide legal controversies concerning personal or property rights, and does not vest in the common councils of cities the power to determine such controversies.
Williams v. Citizens' R. W. Co., 71
2. *Same.—Use of Street to Move House—Destruction of Private Property.*—The moving of a house along a public street of a city is an extraordinary use thereof for an unusual purpose, which may be controlled or denied; and the owner of such a house can not insist on so moving it if such moving will result in the destruction of the property of others.
Ib.
3. *Peddler's License.—Ordinance Requiring.—Sale by Sample of Foreign Goods—Interstate Commerce.*—An ordinance of a town of this State requiring all travelling peddlers of goods to take out a license is not void on the assumption that it applies only to non-residents of such town, for it equally applies to citizens thereof; but it is void as to residents of other States who are engaged in selling goods located in such other States, even though the sale is only by sample, on the ground that it is an interference with interstate commerce.
Anderson School Tp. v. Milroy Lodge, etc. 108
4. *Enumeration of Powers in General Statute.—Effect.*—The enumeration in the general statute for the incorporation of cities of certain powers which would belong to the corporation without such specific enumer-

ation is merely a declaration of a pre-existing power, or of a power which is inherent in the nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. Such enumeration of powers, although it include a portion of those usually implied, does not necessarily operate as a limitation of corporate powers by excluding those not enumerated.

City of Cranfordville v. Braden, 149

5. *Same.—Health and Safety of Inhabitants.—Right to Guard.*—By the act authorizing or incorporating a municipal corporation, the Legislature expressly delegates to the municipality the power to preserve the health and safety of its inhabitants. *Ib.*
6. *Same.—Lighting Street.—Implied Power.*—The power to light the streets and public places of a municipality is one of its implied and inherent powers, necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. No statute is necessary to give it this power. *Ib.*
7. *Same.—Discretion.—Not Controlled by Courts.*—The discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in case of fraud or where the discretion has been grossly abused to the oppression of the inhabitants. *Ib.*
8. *Same.—Power to Light.—Implied Power to Select Means.*—The power to light a city carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. *Ib.*
9. *Same.—Light.—Furnishing to Private Consumers.*—A city has the power to establish works for lighting its streets, and may, in connection therewith, furnish private consumers such light by contract. *Ib.*
10. *Same.—Resolution.—Ordinance.—When May Use Either One.*—Where a city has power to act in a given instance, and its charter or the general law does not prescribe the manner of its action, it may accomplish its purpose either by a resolution or by an ordinance. *Ib.*
11. *Street.—Laying Out Across a Railroad Track.*—A city in this State has power to lay out a street across a railroad's right of way.
Lake Erie, etc., R. R. Co. v. City of Kokomo, 224
12. *Cleaning Streets.—Assessment Against Abutting Property-Owners a Local Assessment, Not a Tax.*—Under the provision of the charter of the city of Indianapolis (Acts 1891, p. 137) which authorizes the city to contract for sprinkling and sweeping the streets at the cost of the property-holders abutting on such streets, an assessment made against an owner of property along a street required to be swept, to pay the expense of such sweeping, is not a tax, but a local assessment, and does not fall within the constitutional provision requiring an equal and uniform rate of taxation.
Reinken v. Fuehring, 332
13. *Same.—Police Power.*—As the general public has an interest in keeping the streets clean, the city may, in the exercise of the police power conferred upon it by the State, order them swept, and as the abutting property-owner derives a benefit from such sweeping not enjoyed by the general public, he may be required, by assessment, to pay the expense of such sweeping; and such assessment does not amount to a taking of private property without compensation and without due process of law. *Ib.*
14. *Same.—General Tax.*—As the property-owner is fully compensated for his outlay in the enhanced value of his property, he may be taxed generally also with the remainder of the public for cleaning other streets in which the public alone have an interest. *Ib.*

15. *Same.—Sweeping Street Crossing.*—The fact that the statute contemplates the sweeping of the crossings does not render it invalid, as it can not be said that the property-owners do not receive a special benefit from keeping them clean. *Ib.*
16. *Vested Right in Office or Public Property.*—A municipal corporation is not clothed with any vested right in a public office, nor does it possess a vested right in public property; and in transferring property and authority from one class of officers to another no vested right of the municipality is invaded. *State, ex rel., v. Kolsem, 434*
17. *Same.—Repeal or Alteration of Charter.*—The charter of a municipality may be repealed or altered at the will of the Legislature. *Ib.*

NEGLIGENCE.

See PRINCIPAL AND AGENT.

1. *Wife Injured at Railroad Crossing when Riding with Her Husband.—Imputing His Negligence to Her.*—A wife injured at a railroad crossing by the negligence of the railway company, while travelling with her husband who is driving his wagon in which she is riding, is not prevented from recovering her damages from such company by reason of the fact that he was guilty of negligence in approaching such crossing. His negligence in such an instance is not imputed to her.
Louisville, etc., R. W. Co. v. Creek, 139
2. *When Question for Court.—When for Jury.*—Where the facts in an action for negligence are undisputed, and the inferences which may be drawn from them are unequivocal, and can lead to only one conclusion, the court will adjudge as a matter of law that there was, or was not, negligence; but if the facts are disputed or equivocal, and different inferences can reasonably be drawn from them, the question of negligence must be determined by the jury under the instructions of the court.
Shoner v. Pennsylvania Co., 170
3. *Same.—Traveller Approaching Railroad.—Failure to Look.—Inferences Drawn by Court.*—A traveller approaching a railroad with the intention of crossing is bound to know that to attempt to cross near and in front of a moving train involves danger; and if he does not look and listen the court will draw the inference that his act contributed to the injury. *Ib.*
4. *Same.—Servant Working at Crossing.—Right to Presume Signals will be Given.—Must Use Care to Avoid Injury.*—A servant rightfully working upon the track of a railway is justified in assuming that those in charge of moving trains will obey an express mandate of the law requiring signals to be given at crossings; but this does not absolve him from the necessity of using reasonable care, proportioned to the dangers incident to his work and position, to avoid injury to himself. *Ib.*
5. *Same.—Rule Applicable to Travellers Approaching and to Servant Working on Track.*—The rule applicable to a traveller approaching a track, requiring him to look, and attributing to him contributory negligence if he do not, is not applicable to a servant of the company on the track repairing it. *Ib.*
6. *Same.—Servant.—Presumption of Knowledge Arising from Showing His Acquaintance with Locality and Duty of Servants in Running Trains.*—Where a servant is injured at a railway crossing by a moving train, which crossing he has known for several years, the courts will presume, in the absence of a showing to the contrary, that during these years the employees of the company, working at that point, had been observant of the duty of reciprocal care for the safety of each other

which the law imposes upon them and obedient to the law relative to the running of trains over crossings, and the injured servant with knowledge of such facts would be justified in acting on the assumption that such careful observance of duty would continue. *Ib.*

7. *Inexperienced Servant.—Presumption of his Exercise of Care*—One employing an inexperienced servant has a right to presume that he will exercise some degree of care to avoid injury, and that he will not place himself in a dangerous position, unless that position is the one he is ordered to occupy. *Spencer v. Ohio, etc., R. W. Co., 181*
8. *Same.—Servant Engaged in Cleaning Railway Locomotive.—Going Under it*.—An inexperienced servant employed in cleaning a locomotive, who gets under it for that purpose without first notifying the person in charge of it of his intention, is guilty of contributory negligence. *Ib.*
9. *Same.—General Allegation of Care Overcome by Specific Allegations Showing Contributory Negligence*.—The general averment of a want of negligence on the part of the plaintiff is controlled by the specific allegations of fact which show that he was negligent. *Ib.*
10. *Same.—Incompetent Fellow-Servant.—Ignorance of Plaintiff of His Incompetency*.—In order to hold a master liable for the incompetency of his servant, whom he knows to be incompetent, when such servant has inflicted an injury on another servant, the latter must aver and show that he himself was ignorant of the fact that his fellow-servant was incompetent. *Ib.*
11. *General Averment of Freedom from Contributory Negligence.—Specific Averment of Facts Overcoming*—A general averment that the plaintiff "was without fault or negligence in all said matter, and acted with prudence and with care in all said transactions," is sufficient to show that the plaintiff was free from contributory negligence, unless the specific averment of facts show that he was, notwithstanding, guilty of such negligence. *Stewart v. Pennsylvania Co., 248*
12. *Same.—Use of Senses and Exercise of Reasoning Faculties by Plaintiff*.—A person is bound to use the senses, and exercise the reasoning faculties with which nature has endowed him; and if he fail to do so, and is injured in consequence, neither he, in life, nor his representatives after his death, can recover for resulting injuries. *Ib.*
13. *Of Railroad Company.—Defective Tie.—Injury to Employee*.—In an action for the death of plaintiff's decedent, alleged to have been caused by the defendant's negligence, the complaint alleged that while the decedent, a yard conductor in the employ of the defendant, was making up a train and coupling cars his foot caught under the slivered portion of a defective tie, whereby he was, without fault on his part, thrown down on the track, run over and killed; that the decedent had no knowledge of the defective tie which caused his injury, and that the defendant had knowledge of such defect long enough before the decedent was injured to have repaired the same, but negligently failed and refused to make such repairs.
Held, that the complaint stated a cause of action.
Pennsylvania Co. v. Brush, 347
14. *Contributory Negligence.—Averment that Plaintiff was Free from.—Effect*.—An averment in the complaint, in an action for negligence, that the plaintiff was without fault or negligence which contributed to his injury is sufficient, unless it is overcome by the specific averments of the complaint, showing, notwithstanding, that he was guilty of contributory negligence. *Cincinnati, etc., R. W. Co. v. Darling, 376*
15. *Damages.—Complaint.—Insufficiency of*.—In an action to recover damages for an injury alleged to have been sustained by reason of the fact

that the plaintiff was ordered by the superintendent of the mill to leave his particular work and to go and perform a certain other service, and that he was injured by a stone slab falling upon him which had been negligently left unpropped and unsupported, the complaint is insufficient. It does not charge the superintendent with any negligence, even if the defendant would be answerable for his negligence on the theory that he was a vice-principal. It is not averred that he superintended the unloading, or directed how the stone should be placed or left, or that he had any knowledge whatever of the manner in which it was left. *Reed v. Browning*, 575

NEWLY-DISCOVERED EVIDENCE.

See NEW TRIAL.

NEW TRIAL.

See BILL OF EXCEPTIONS, 12; PRACTICE, 36.

1. *Newly-Discovered Evidence.—Affidavit of Witness Must be Produced.—Defendant in Custody no Excuse.*—On a motion for a new trial because of newly-discovered evidence, the affidavit of the witness who will testify as alleged must be produced, and it is no excuse that the party moving for the new trial is in custody. *Vandyne v. State*, 16
2. *Newly-Discovered Evidence.—Diligence.*—A new trial will not be granted on account of newly discovered evidence, wherever, by the use of reasonable diligence, the evidence might have been discovered, and obtained for use at the trial. The facts constituting the diligence used before the trial to obtain the evidence must be pleaded, and it is not sufficient merely to allege that due diligence was used. *Anderson v. Hathaway*, 528
3. *Same.—Complaint Must Show Materiality of Newly-Discovered Evidence.*—In an action for a new trial on the ground of newly-discovered evidence, the complaint is fatally defective if it fails to show, upon its face, the nature of the original action and the materiality of the newly-discovered evidence. *Ib.*
4. *Newly-Discovered Evidence.*—A motion for a new trial because of newly-discovered evidence may be overruled if it is not shown that diligence was used to procure it before the trial. *Johnson v. Brown*, 534

NOLLE PROSEQUI.

See CRIMINAL LAW, 3, 4.

NON-RESIDENT.

See WRITS AND PROCESS.

NOTICE.

See DRAINAGE, 3; GRAVEL ROADS, 3, 5; GUARANTY; HIGHWAY, 5, 18, 20; JURISDICTION, 7 to 9; NUNC PRO TUNC ENTRY, 4.

NUNC PRO TUNC ENTRY.

See BILL OF EXCEPTIONS, 12.

1. *Auxiliary.—Appeal.*—A proceeding for a *nunc pro tunc* order is part of the original cause of action, and auxiliary thereto, and may be brought up on appeal of that action. *Harris v. Tomlinson*, 426
2. *Same.—Appeal.—How Taken.*—*Nunc pro tunc* entries made during the progress of a case can not be appealed from as such, but may be brought up with the case when an appeal of such case is taken; but such entries made after the case has been determined may be appealed from without bringing up the entire case. *Ib.*

3. *Same.—Motion for a New Trial.*—In order to present the sufficiency of the evidence on a motion for a *nunc pro tunc* entry, a motion for a new trial is not necessary. *Ib.*
4. *Same.—Notice.—Summons.*—A mere notice is sufficient on a motion for a *nunc pro tunc* entry, and a summons is not required; but if a summons is issued it will be treated as a notice. *Ib.*
5. *Same.—Pleading.—Motion.—Sufficiency.*—On such a motion no formal pleading is necessary, and no great strictness is required in the preparation of the motion. *Ib.*
6. *Same.—Inherent Power of Court.*—A statute is not necessary to enable a court to correct mistakes and make its record speak the truth. *Ib.*
7. *Same.—Office Not to Correct Mistakes.*—Such an entry can not be used as a medium whereby a court can change its rulings actually made, however erroneous or under whatever mistakes of law or facts such ruling may have been made; nor to correct mistakes made by counsel in the introduction of evidence. *Ib.*

OFFICE AND OFFICER.

1. *Successor.—Who May Select.—Holding Over.*—Where an officer is lawfully elected and in the possession of an office his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which he owes his election, or which by law is entitled to elect his successor. *Kimberlin v. State, ex rel., 120*
2. *Same.—Death Before Qualification.—Vacancy.*—No vacancy occurs in an office where the person elected to fill it dies before he qualifies, or even dies after the polls are closed and before the result is ascertained. *Ib.*
3. *Same.—Death of Candidate After Polls Closed and Before Result Ascertained.*—If a candidate dies after the polls are closed and before the result is ascertained, yet if he has received a majority of the ballots he is duly elected. In such an instance no vacancy occurs in the office, and it can not be filled by appointment. *Ib.*
4. *Same.—Appointment when no Vacancy.*—An appointment to fill a vacancy in an office is void when there is no vacancy. *Ib.*
5. *Holding Two Offices at Same Time.*—One can not legally hold the office of school trustee of an incorporated town and the lucrative office of postmaster at the same time. *Wood v. State, ex rel., 364*
6. *Same.—Quo Warranto.—Demand for Surrender of Office not Necessary.*—Under the second subdivision of section 1131, R. S. 1881, to entitle one claiming an office held by another to a judgment of ouster, no demand for a surrender of the office is necessary. *Ib.*
7. *Liability of Judicial Officer for Wrongful Decision.*—A judicial officer, acting in the exercise of judicial functions, is not liable to a party injured, however erroneous his decision may have been. *Alexander v. Gill, 485*

ORDINANCE.

See MUNICIPAL CORPORATION, 10.

PARTITION.

1. *Building Erected Under Agreement that One Person Should Own the Upper and Another the Lower Story.*—There can be no partition of a building as between the parties where it is built under an agreement to the effect that the first story and the ground should be owned by one of them and the second story by the other, with a right of egress and ingress over such ground for the owner of the upper story. *Anderson School Tp. v. Milroy Lodge, etc., 108*

2. *Decree not Final*.—An order decreeing partition is not a final decree in the full and true sense of the term, for it remains open for the purpose of controlling the mode and basis of the partition.

Rouch v. Baker, 368

3. *Same*.—*Decree*.—*Effect of*.—*Commissioners' Report*.—*Subsequent Sale*.—An order directing partition and appointing commissioners does not conclusively adjudicate the question as to the divisibility of the land; and if the commissioner report that the land is not susceptible of division, the court may approve the report and order a sale of the property.

Ib.

PARTNERSHIP.

See CHATTEL MORTGAGE, 1.

PAYMENT.

See INTEREST, 1; JUDGMENT, 8; PLEADING, 1; PRINCIPAL AND SURETY, 2.

PEDDLER.

See MUNICIPAL CORPORATION, 3.

PERJURY.

Claim for Sheep Killed by Dogs.—*False Affidavit*.—*Under What Statute Claimant Must be Prosecuted*.—A claimant for compensation for the value of sheep killed by dogs, who makes a false and corrupt affidavit to his claim, can not be prosecuted for perjury under the general statute (section 2006, R. S. 1881) defining that crime, but must be prosecuted under the statute (Elliott's Supp., section 450) providing for the presentation and payment of such claims, and defining the offence of one who falsely swears to such a claim.

State v. Runyan, 208

PERSONAL INJURIES.

See MASTER AND SERVANT; NEGLIGENCE.

PETITION.

See GRAVEL ROAD, 1; HIGHWAY, 20.

PLAT.

1. *Construction*.—A plat must be construed like a written instrument, and no part of it can be regarded as superfluous or meaningless if such a result can be reasonably avoided.

City of Noblesville v. Lake Erie, etc., R. R. Co., 1

2. *Same*.—*Practical Construction*.—If the meaning of the person who executed a plat is doubtful, the practical construction put upon it by the acts of parties concerned will be accepted and followed by the courts.

Ib.

PLEADING.

See BOUNDARIES, 1; DAMAGES; DEMURRER; EXECUTION, 2; INJUNCTION, 4; NEGLIGENCE, 9, 11, 14, 15; NUNC PRO TUNC ENTRY, 5; QUIETING TITLE, 2.

1. *Reply to Plea of Payment, Admitting that Part was Paid*.—To plea of payment in full, a reply admitting a part payment and averring that no more was paid is sufficient.

Lillie v. Trentman, 16

2. *Allegations of Ownership*.—*Sufficiency as to*.—See opinion.

Hoosier Stone Co. v. Malott, 21

3. *Vagueness*.—*Uncertainty*.—*Demurrer*.—Vagueness and uncertainty in a pleading are not reached by demurrer. The remedy is by motion to make the pleading more certain or specific.

Sheeks v. Erwin, 31

4. *Former Adjudication Shown by Complaint*.—*Demurrer*.—Where a complaint shows that the matter in controversy has been once adjudicated

- between the plaintiff and defendant, a demurrer to it for want of facts should be sustained. *Indianapolis, etc., R. W. Co. v. Center Tp., 89*
5. *Title.—Special Pleading.*—In pleading title, a general averment must yield to a specific one, and if the specific allegations do not show title the complaint is bad. *Morgan v. Lake Shore, etc., R. W. Co., 101*
 6. *Same.—Anticipating Defence.*—If the plaintiff undertakes to anticipate a defendant's defence, he must effectually show that such defence is insufficient. *Ib.*
 7. *Prayer not a Test of.*—A pleading is tested and construed by the facts it states, not by its prayer. *McGuffey v. McClain, 327*
 8. *Exhibit.—Supplying Omission in Pleading.*—A paper not properly an exhibit can not supply an omission in the pleading. *Armstrong v. Farmers' Nat'l Bank, 508*
 9. *Want of Verification.—Demurrer.—Motion to Reject.*—Want of verification of a pleading can not be raised by a demurrer, but must be taken advantage of by a motion to reject for want of verification. *Champ v. Kendrick, 549*
 10. *Complaint.—Insufficiency of.—May be Raised by Motion in Arrest.*—The objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur, and is cause for a motion in arrest of judgment. *Reed v. Browning, 575*
 11. *Same.—Intendment After Verdict will not Supply an Omitted Essential Fact.*—The doctrine of intendment after verdict, whereby a pleading that would be held bad on demurrer will be held good after verdict, will aid by presumption a defective or imperfect averment of a fact, but will not supply an omitted fact which is necessary to the statement of a cause of action. *Ib.*

POLICE POWER.

See MUNICIPAL CORPORATION, 13.

Delegation to Municipalities.—How Made.—The police power primarily inheres in the State; but the Legislature may delegate, at least a part of it, to municipal corporations, either in express terms or by implication arising from the fact of the creation of such corporations. *City of Crawfordsville v. Braden, 149*

POOR PERSON.

1. *Review of Discretion of Trial Court in Refusing to Award Counsel to Defend a Poor Person.*—The discretion of a trial court in refusing to award counsel to a defendant on trial, upon his application as a poor person, is subject to review in the Supreme Court. *Hendryx v. State, 265*
2. *Same.—Power of Court to Award Counsel to Defend.*—A trial court has ample power to award counsel to defend a person charged with crime who is too poor to secure counsel to present his defence. *Ib.*
3. *Same.—Parents of Defendant Able to Secure Counsel for Him, but Refusing to do so.*—The fact that the parents of the defendant are amply able to secure for him counsel is no reason for refusing to assign him proper counsel when they refuse to do so. *Ib.*
4. *Same.—Attorney Volunteering Services After Court's Refusal to Appoint.—Error not Cured.*—If a court erroneously refuse to assign counsel, the error is not cured by an attorney offering his services and conducting the defence over the protest of the accused, and which services the accused declines to accept. *Ib.*

POSSESSION.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3, 4.

POWER OF ATTORNEY.

When Must be Recorded.—The statute requiring a power of attorney to be recorded does not apply to a power to assign judgments.

Boos v. Morgan, 305

PRACTICE.

See BILL OF EXCEPTIONS; INSTRUCTIONS TO JURY; NUNC PRO TUNO ENTRY; PLEADING; QUIETING TITLE, 1.

1. *Law of the Case.*—The principles of law established on a former appeal, so far as applicable, remain the law of the case on a second or other appeal, and through all of the subsequent steps taken in said cause, and must be followed, whether right or wrong.
Lillie v. Trentman, 16
2. *Same.*—*Rule as to Pleading on Second Appeal.*—Where the sufficiency of a pleading has been passed upon by the Supreme Court, that ruling will be followed on a second or other appeal, unless such pleading has been amended so that its character is materially changed. *16*
3. *Supreme Court.*—*Reversal.*—*When will Direct Lower Court to Enter Judgment.*—Where the facts are not in dispute, all the material matters appearing upon the face of the record, and such record enables the appellate court to ascertain and declare the justice of the cause, that court will direct the lower court what judgment to enter, and not remand the cause for a new trial.
McAfee v. Reynolds, 33
4. *Reversing Case on the Evidence.*—If the evidence tends to support the verdict, the Supreme Court will not reverse the case, no matter how contradictory it may be when considered as a whole.
Coryell v. State, 51
5. *Evidence.*—*Objection to, Particularity of.*—Objections to evidence to be available, must be reasonably specific; and it is not enough to state that it is "incompetent," "immaterial," or "improper."
Evansville, etc., R. R. Co. v. Fettig, 61
6. *Variance.*—*When Objection Must be Raised.*—A party desiring to take advantage of a variance between the pleadings and proof must make his objection at the proper time during the trial, and, if he does not do so, he can not afterwards avail himself of such variance.
Taylor v. State, 66
7. *Assignment of Error.*—Assigning that the court erred in "overruling the appellant's answer in abatement" presents no question on appeal.
Dye v. State, 87
8. *Irrelevant Cross-Examination Showing Defence without Objection.*—*Witness Recalled and Objection Interposed for First Time*—If a plaintiff permits, without objection, a defendant to go into his defence on cross-examination of the former's witness, he can not thereafter object when such witness is recalled and additional questions relating to such defence are propounded to him. It is then too late to object.
Horton v. Brown, 113
9. *Technicalities.*—*Disregarding.*—*Informalities.*—Slight informalities, or failures to comply strictly with the rules of practice, in matters where such informalities or omissions will not work injustice or impose any hardship on the opposite party, should be disregarded when a substantial controversy existing between the parties is so presented that the court can apply the law and adjust their rights.
Louisville, etc., R. W. Co v. Creek, 139
10. *Supreme Court.*—*Conclusions of Law.*—*Question, How Presented.*—In order to present a question on the correctness of the conclusions of law of the trial court on the facts found, an exception to the conclusions of

law must be taken at the time the decision is made; and it must be assigned as error in the Supreme Court that the court below erred in its conclusions of law. *Midland R. W. Co. v. Dickason*, 164

11. *Same.*—*Objection not Raised Below.*—Where the exception is not to the conclusions of law, but to the rendition of the judgment, the appellant will fail. *Ib.*
12. *Damages.*—*Omission to Aver.*—*Defect Cured by Verdict.*—The omission of an averment of the amount of damages sustained is cured by the verdict. *Brauns v. Gleisig*, 167
13. *Same.*—*Damages.*—*Failure of Proof.*—*Injunction.*—If there is no proof of damages, the court can only award nominal damages, even though the plaintiff be entitled to an injunction. *Ib.*
14. *Judgment on Reversal.*—*When will not be.*—*Order Entered on Interrogatories.*—On reversal of a judgment entered on the special findings of the jury, the Supreme Court will seldom order the entry, by the lower court, of a judgment on the general verdict; but will order that a new trial be granted, unless the entire record below is in the transcript and affirmatively shows that no injury would be done the appellee by entry of a judgment on the verdict. *Shoner v. Pennsylvania Co.*, 170
15. *Same.*—*Rules of Practice Must be General.*—Rules of practice must be general, and should be framed with a view to insuring, so far as possible, just results in all cases, and minimizing the danger of injustice being done to parties in any case. *Ib.*
16. *Precipe on Appeal.*—*Construction.*—*Incidental Entries and Distinct Papers.*—*Precipe Part of Record on Appeal.*—A liberal construction will be given to the *precipe* on appeal, and incidental entries will be deemed impliedly embraced in the specific directions. The *precipe* is a part of the record on appeal. Section 649, R. S. 1881. *Allen v. Gamis*, 190
17. *Same.*—*Omission of Parts of Record.*—*Precipe.*—*Effect.*—A party who appeals must present a proper transcript, and if he directs in his *precipe* filed with the clerk below what shall be incorporated in it, and his directions omit independent papers or entries essential to present the questions involved below, the appeal will be dismissed or the judgment below affirmed. *Ib.*
18. *Same.*—*Burden on Appellant to Show Prejudicial Error.*—Error to be available on appeal must clearly appear in the record, without the aid of any extrinsic matter, and it must also appear from such record that the error was probably prejudicial to the appellant. *Ib.*
19. *Special Denial.*—*Sustaining Demurrer There to.*—It is not error to sustain a demurrer to a special denial where the evidence admissible thereunder is admissible under the general denial already in, and the same defence can be made under the general denial as under the special denial. *Wood v. State, ex rel.*, 364
20. *Same.*—*Objections to Evidence not Raised Below.*—Objections to evidence, not made when it was introduced, will not be considered on appeal. *Ib.*
21. *Proof of Answer Stating no Defence.*—*Effect.*—Proof of a bad answer will not entitle a defendant to judgment where the answer does not state any defence. If there is an absolute failure to state facts constituting a defence, evidence sustaining such an answer will not avail. *Indiana, etc., R. R. Co. v. Larren*, 368
22. *Same.*—*Failure to Demur.*—*Waiver.*—If there is not an utter failure to state a defence the objections are waived by the failure to demur, but

where there is no defence at all pleaded the question is one of evidence, and the appellate tribunal decides it as a question of evidence, not as one of pleading. *Ib.*

23. *Interrogatories.—Verdict Shown to be Based on Bad Paragraph.*—If it affirmatively appears from the interrogatories that the verdict is in part based upon an insufficient paragraph of complaint, it is a sufficient cause for a new trial, being "contrary to law."
Cincinnati, etc., R. W. Co. v. Darling, 376
24. *Sane.—Verdict in Part Based on Bad Paragraph.—One Paragraph in Part Unsupported by Evidence*—A verdict which is in part based on a bad paragraph of complaint, or which the record shows is in part based upon a paragraph of complaint which is wholly unsupported by the evidence, can not stand. *Ib.*
25. *Objections to Evidence.*—Only such objections to evidence will be considered on appeal as were made when the evidence was offered in the court below. *Stantley v. Holliday, 464*
26. *Same.—Objections to Evidence Must be Specific.*—A general objection to the introduction of evidence is not sufficient to present any question on appeal. The objection must be specific. *Ib.*
27. *Demurrer to Paragraph of Answer.—Erroneously Sustaining.*—Another Paragraph on File.—Sustaining a demurrer to a paragraph of answer when another paragraph is on file which is applicable to the same state of facts plead in the one to which the demurrer is sustained is a harmless error. *Pattison v. Babcock, 474*
28. *Trial Court.—Presumptions in Favor of Proceedings of.*—On appeal the presumption is in favor of the proceedings of the trial court, and a party who assails them must affirmatively show prejudicial error. *Taylor v. Birely, 484*
29. *Appeal.—Notice to Co-parties.—When Not Necessary.*—When all the defendants against whom a judgment has been rendered appeal, it is not necessary to serve notice on other defendants to the record, against whom no judgment has been rendered, and who have no interest in the appeal. *Alexander v. Gill, 485*
30. *Same.—Joint Demurrer.*—In such an instance the appellants may assign as error a joint demurrer filed by all the defendants with the same effect as if all the defendants were appellants. *Ib.*
31. *Reversing Case on Weight of the Evidence.*—The Supreme Court will usually not reverse a case on the evidence, although the appellant has the preponderance. *Barr v. Vermilya, 512*
32. *Supreme Court.—Failure to Specifically Point Out Defects in Pleading.*—Defects in a pleading which are not apparent from a bare statement, must be specifically pointed out by counsel, and they must support their position by argument, and, if need be, by the citation of authorities; and unless this is done, the court will assume that no defects exist in the pleading. *Tucker v. Sellers, 514; Tucker v. O'Neal, 597*
33. *Motion to Strike Out Pleading.—Overruling, Harmless Error.*—Overruling a motion to strike out a pleading is not ground for a reversal. *Johnson v. Brown, 534*
34. *Same.—Objections to Evidence.—General.*—Objections to evidence offered that it is "incompetent, immaterial and irrelevant" are too general to present any question when such objections are overruled. *Ib.*
35. *Pendency of Another Action.—How Raised.—Motion to Dismiss.—Plea in Abatement.*—It is proper to overrule a motion made by a guardian *ad litem* to dismiss an action for the reason "that there is now pending in this court another action in which it is sought to have settled

the only question which can be adjudicated in this cause." The matter sought to be raised by the motion must be plead in an answer of abatement, duly verified. *Champ v. Kendrick, 549*

36. *Alleged Errors.—How Brought Into Record.—Motion for New Trial.*—Alleged error in empanelling a jury and in forcing a cause to trial in the appellant's absence, and without notice to her, and in refusing to her time to consult counsel and prepare for trial, must in order to be considered by the Supreme Court be brought into the record by the motion for a new trial, as errors of law occurring at the trial. *Martin v. Molsinger, 555*

PRECIPE.

See PRACTICE, 16, 17.

PREFERENCE OF CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2.

PRESUMPTION.

See HIGHWAY, 4, 21; INSTRUCTIONS TO JURY, 3, 4.

PRINCIPAL AND AGENT.

Goods Damaged in Shipping by Negligence in not Protecting them while Waiting on Wharf for Transportation.—A. and B. entered into a written contract whereby A. agreed to furnish certain goods and B. agreed to sell them, make weekly reports, and after paying the necessary costs, they were to divide the net profits, the goods to remain the property of A., and B. to ship them to him whenever A. desired to close out the business. A. retained the right to control the business. Sometime after the business was commenced, A. wrote B. and requested him to ship the goods to him by boat. A. packed the goods and delivered them at the wharf to C., who was in charge and engaged in shipping goods by a certain line of boats, but he was not the agent of said line, and had no authority to bind it. C. signed a receipt for the goods. They remained unprotected on the wharf all night and were shipped by C. on the first boat, but during the night they were damaged by rain, because of their unprotected condition.

Held, that B. was liable for the damage, that C. was his agent and not the agent of A. nor of the boat line. *Bechtold v. Lyon, 194*

PRINCIPAL AND SURETY.

See MARRIED WOMAN, 2.

1. *When Question of Suretyship May be Tried.*—Where the question of suretyship has not been determined in the original action, a complaint may be filed after the term at which judgment was rendered, and after the surety has paid the judgment, to adjudicate the question. *Frank v. Traylor, 145*
2. *Same.—Payment by Surety when Question of Suretyship not Determined.—Right of Surety as Against Assignee of Subsequent Judgment Against His Principal.—Question of Suretyship put in Issue on a Defence*—If a surety, whose suretyship is not determined by the judgment, pay the amount due on such judgment, and take an assignment by record of it to himself, he may enforce the lien of such judgment as against the assignee of a judgment rendered subsequently against his principal; and if the assignee bring an action challenging the priority of his lien, he may set up the fact of his suretyship by answer, and have the matter then determined. *Id.*
3. *Replevin Bail.—Sale of Land of Before Sale of Principal's Land.—Waiver.—When Right to Subrogation Ceases.*—A replevin bail by voluntarily

paying the judgment against his principal does not lose his right to be subrogated to the lien of the judgment; nor does he lose such right if he permit his own land to be levied upon and sold without compelling the executive officer to levy upon the land of the principal; neither does mere procrastination, not extending beyond the expiration of the lien of the judgment, defeat his right.

Armstrong v. Farmers' Nat'l Bank, 508

PRIORITY OF LIEN.

See DRAINAGE, 5; JUDGMENT, 2; SHERIFF'S SALE, 9; SUBROGATION, 4.

PROMISSORY NOTE.

Payable to Cashier of Bank.—Right of Bank to Sue.—A note payable to the cashier of a bank is to be deemed payable to the bank, and the bank may sue thereon as payee.

Erwin Lane, etc., Co. v. Farmers' National Bank, 367

PROSECUTING ATTORNEY.

See INSANITY, 2.

PUBLIC HEALTH.

See MUNICIPAL CORPORATION, 5.

QUIETING TITLE.

See APPEAL, 1; COSTS, 2; JUDGMENT, 19; WILL, 1.

1. *Practice—Striking Out Special Answer.*—In an action quieting title it is not error to strike out a special answer when the general denial is on file. *Mason v. Roll, 260*
2. *Sufficiency of Complaint.—Averment of Title.*—In a suit to quiet title, an averment that the plaintiff "is the owner by complete equitable title, and entitled to the possession of the" real estate is sufficient to render the complaint good on demurrer. *Stanley v. Holliday, 464*

QUO WARRANTO.

See OFFICE AND OFFICER, 6.

Information.—Relator's Interest Must be Shown.—In an action to dissolve a corporation, brought by an individual, the information must disclose the relator's interest in the subject-matter of the action; and merely alleging "that the relator claims an interest in the corporation and franchise which is the subject of this information," is not sufficient. *State, ex rel., v. Ireland, 77*

RAILROAD.

See NEGLIGENCE, 1 to 6, 8, 13.

1. *Additional Track in Street.*—Where a donor of a street attaches a condition to it that a railroad company shall have the right to lay its tracks therein, and such company lays and uses only one track in such street, it does not lose its right to lay therein an additional track, even though more than twenty years have elapsed between the grant and the assertion of its right to lay the additional track. *City of Noblesville v. Lake Erie, etc., R. R. Co., 1*
2. *Levy of Execution on Locomotive—Injunction.*—An executive officer may levy upon and sell a locomotive upon an execution he holds against the railway company, and such company can not enjoin the sale. *Midland R. W. Co. v. Stevenson, 97*
3. *Ejectment.*—Ejectment will not lie against a railway company to recover land on which its road is located and operated after public rights have intervened. *Morgan v. Lake Shore, etc., R. W. Co., 101*

4. *Appropriation.—Use of Map in Evidence in Assessing Damages.—How May be Considered.*—In assessing damages occasioned by the appropriation of a right of way across unplatted land near to or adjacent to the platted territory of a city, a map showing how the streets of the city could be extended across such unplatted tract, and also showing its situation with reference to the city and its streets, may be put in evidence for the purpose of showing the size of the tract of land, its form, shape and relation to other territory; and it may also be considered to show the actual condition of the land and the right of way, if such facts are shown thereon; but it can not be considered as showing lots and streets laid off on such land, although the map show the tract as platted territory. *Ohio Valley, etc., Co. v. Kerth, 314*
5. *Same.—Damages.—Value of Land Near City.—Prospective Use for City Purposes.*—In assessing damages the jury may consider the proximity of the land sought to be appropriated to a city or town, and its increased value occasioned by the certainty of its near future use for suburban purposes. *Id.*
6. *Same.—Value.—Proof of.—Competency of Witness to Testify to.—Sufficiency of Knowledge (Concerning Land and Location of Railroad).*—A witness who testifies that he is acquainted with the value of land in the vicinity of the land sought to be appropriated, and with the particular tract in question, both before and after the appropriation, may testify what its value was before the railroad ran through it and also its value after it ran through it, without first showing his knowledge of the railroad, the way it is located across the land, the fills and cuts, and other matters affecting the question of damages. *Id.*
7. *Construction of.—Laborer's Lien.—Payment to Contractor Constitutes no Defence.*—A laborer who does work in the construction of a railroad, and gives the notice required by the statute, is entitled to a lien. Where the notice is given in due time and manner, payment to the contractor will not defeat his rights. *Indiana, etc., R. R. Co. v. Larren, 368*
8. *Condemnation for.—Entirety of Land Injured.*—A line of railway was established across a farm which consisted of several different tracts of land, all lying contiguous to each other, and all used together as one farm. The line of railway thus established passed between certain of the tracts, separating them from each other.
Held, that this does not necessarily so separate the several tracts that they can not thereafter be considered together in assessing damages for the right of way of other railroads. They may notwithstanding still constitute but one farm. *Chicago, etc., R. W. Co. v. Huncheon, 529*
9. *Same.—Assessment of Damages.—Lands to be Considered.—Jury.—Question for.*—In assessing the amount of damages for a right of way where the lands affected are parts of one farm, lying in one compact body, or, although composed of separate and distinct tracts or governmental subdivisions, the separate tracts lie contiguous, are owned by one person, and are used together as comprising one farm, whatever may be its size, damages should be considered and assessed for the entire farm; and whether the several tracts or subdivisions do lie contiguous, and are in fact used together as one farm, is a question of fact to be determined by the jury from the evidence. *Id.*
10. *Same.—Easement.—Right of Way is Only.*—A right of way acquired by a railroad company by an appropriation under the statute is a mere easement. *Id.*

RATIFICATION.

See **MARRIED WOMAN, 2.**

REAL ESTATE.

Title by Adverse Possession, Necessity of Actual Possession.—Color of Title.—If the claimant of land has title by deed, it is not necessary that he should take actual possession of all the property granted; and this is true even though he have no more than color of title, actual possession of a part being such possession of all the property as will give title by lapse of time. The *pedis possessio* is only necessary where there is no color of title. *City of Noblesville v. Lake Erie, etc., R. R. Co., 1*

REAL ESTATE, ACTION TO RECOVER.

Res Judicata.—*Judgment for Recovery of Part of Tract.*—If the owner bring an action to recover possession of a single and undivided tract of land and succeed, he can not afterwards bring an action, upon the same grounds he brought the first action, to recover the remaining part. *Roby v. Eggers, 416*

RECORDING MORTGAGE.

See MORTGAGE, 2.

REDEMPTION.

- [1. *Day for, Falling on Sunday.*—Where the last day of the redemption year falls on Sunday, the land may be redeemed on the following Monday. *Backer v. Pyne, 288*
2. *Same.—Computation of Time.*—In computing the time within which a redemption from a sheriff's sale may be made, the day of sale must be excluded. *Id.*

REFUNDING.

See ADVANCEMENT.

REMONSTRANCE.

See DRAINAGE, 7; HIGHWAY, 22.

REPEAL OF CHARTER.

See MUNICIPAL CORPORATION, 17.

REPLEVIN BAIL.

See PRINCIPAL AND SURETY, 3.

RES JUDICATA.

See JUDGMENT, 7, 20; REAL ESTATE, ACTION TO RECOVER.

REVIEW OF JUDGMENT.

See JUDGMENT, 22.

REVOCATION.

See TRUST.

ROAD SUPERVISOR.

See HIGHWAY, 16.

RULE IN SHELLEY'S CASE.

See DEED, 2.

RIGHT OF WAY.

See INJUNCTION, 1; RAILROAD, 10.

RIGHTS AND REMEDIES.

See EQUITY; JUDGMENT, 12, 18.

SCHOOLS.

Taxation.—Property of Persons Transferred for School Purposes.—Where a person is transferred from one township, town or city to another for school purposes, he must pay on all his property, situated in the township, town or city to which he is transferred, as well as that situated in the township, town or city in which he resides, the same rate of school and poll taxes as is paid by the people of the township to which he is transferred, and for the use of that township, and it is the duty of the auditor to extend the assessment to such property and the poll of the person at the rate fixed by the corporation to which he is transferred. *Johns v. State, ex rel., 522*

SHERIFF'S SALE.

1. Land remaining in the possession of a debtor must be sold before resort can be had to land he has sold and upon which a judgment against him is a lien; and the purchaser, by a timely application to a court of equity, may compel the sheriff to first resort to the lands still retained by such debtor. *Boos v. Morgan, 306*
2. *Same.—Bid by Judgment Plaintiff.—Paying Amount of Bid.*—Where a judgment plaintiff bids in the land sold, his receipt to the sheriff for the amount of his bid, when it does not exceed the amount due him on the execution, is a sufficient payment of such bid. *Ib.*
3. *Same.—Sale on Satisfied Judgment.*—A sale on a satisfied judgment is void. *Ib.*
4. *Same.—Notice of Irregularities.—Bona Fide Purchaser.*—A judgment plaintiff purchasing at his own sale is chargeable with notice of all irregularities. He is not a bona fide purchaser. *Ib.*
5. *Same.—Extinguishment of Judgment by Sale.*—The sale of land and the payment of the bid, when it is sufficient to satisfy the amount due and costs, is an extinguishment of the judgment. *Ib.*
6. *Same.—Irregular Sale.—Collateral Attack.*—A mere irregular sale can not be collaterally attacked. *Ib.*
7. *Liens on Land Sold.—Assumption of.*—In the absence of an assumption of, or agreement to pay, existing liens, land sold at a judicial sale remains the primary fund for the payment of the encumbrances thereon, to the extent of its value and in the order of their seniority. *Myers v. O'Neal, 370*
8. *Same.—Purchaser not Liable for Liens on Land Purchased.*—A purchaser at a judicial sale is not, by the mere fact of his purchase, liable to pay the debts secured by liens on the land purchased. *Ib.*
9. *Same.—Purchaser Buying in Liens and Causing Sale Thereon.—Title as Against Junior Lien-Holder.*—A purchaser of land at a judicial sale may cause said land to be sold on a prior lien that he has acquired, and obtain a valid title to said land by purchase at such sale as against a junior lien-holder. *Ib.*
10. *Ejectment.—Attacking Validity of Sale.—Attack by Cross-Complaint is not a Collateral Attack.*—Objections to a sheriff's sale may be made in an action to recover possession of land thereunder; and an attack upon the validity of such sale by way of cross-complaint is a direct and not a collateral attack. *Branch v. Foust, 538*
11. *Same.—Purchaser.—Notice to of Irregularities.*—A purchaser who is a party to the judgment is chargeable with notice of all irregularities in the sale. *Ib.*
12. *Same.—Inadequacy of Price.*—Mere inadequacy of price alone is not sufficient to justify setting aside a sale of land, unless the difference

between the value of the land and the price paid is so great as to shock the sense of justice and right. *Ib.*

13. *Same.*—If, coupled with great inadequacy of price, there are circumstances showing fraud, irregularity or great unfairness, a court of equity will not hesitate to set a sale aside, especially where a direct attack is made upon it. *Ib.*

SLANDER.

Defendant, Laying Foundation for Impeachment of.—*Slandorous Words Spoken at Other Times and Places.*—In an action in slander, where the defendant as a witness in his own behalf denies speaking the slanderous words charged, it is not competent, in rebuttal, for the purpose of impeaching him, to show that he did speak the words charged at other times and places, even though he denied on cross-examination that he had spoken them at such times and places.

Johnson v. Brown, 534

SPECIAL FINDINGS.

See FRAUDULENT CONVEYANCE, 3; INTERROGATORIES TO JURY; VERDICT, 3.

1. *Irreconcilability.*—*Sufficiency to Overturn General Verdict.*—To overthrow the general verdict the special findings must be irreconcilably in conflict with it upon any reasonable hypothesis.

Shoner v. Pennsylvania Co., 170

2. *Same.*—*Reconcilable with General Verdict Under any State of Facts.*—*Evidence.*—A general verdict is not controlled by the special findings if such findings are reconcilable with each other under any supposable state of facts provable under the issues, without reference to the evidence. *Ib.*

3. *Same.*—*Presumption in Aid of.*—The court will not presume any thing in aid of the special findings, but will make every reasonable presumption in favor of the general verdict. *Ib.*

4. *Same.*—*When will Prevail.*—If the special findings can not be reconciled with the general verdict, the former must prevail. *Ib.*

SPECIAL JUDGE.

Objection to, Delay in Making.—When a judge has been called or an attorney appointed to try a cause, and no objection is made to the call or his appointment at the time, or to his sitting in the cause at the time he assumes jurisdiction, all objections to the regularity of such appointment are waived. *Lillis v. Trentman, 16*

SPECIAL LAWS.

See CONSTITUTIONAL LAW, 4 to 6.

STATUTE.

See APPEAL, 1; ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; CONSTITUTIONAL LAW, 1; EXECUTION, 1; HIGHWAY, 18, 21; MUNICIPAL CORPORATION, 12; OFFICE AND OFFICER, 6; PERJURY; PRACTICE, 16; STATUTE OF LIMITATIONS, 3.

Construction.—*Examining Other Statutes.*—*Legislative Intent.*—*Meaning Doubtful.*—*Purpose.*—*History.*—For the purpose of construing a statute and ascertaining the legislative intent the courts will look to the whole statute and all its parts, and when such intention is so ascertained, it will prevail over the literal import and the strict letter of the statute; and where the meaning is doubtful and uncertain, the courts will look into the situation and circumstances under which it was enacted to other statutes, if there are any on the same subject, whether passed before or after the statute under consideration, whether in

force or not, as well as to the history of the country, and will carefully consider, in this connection, the purpose sought to be accomplished. *Parvin v. Wimberg*, 561

STATUTE CONSTRUED.

See INSURANCE, 1 to 3; MARRIED WOMAN, 1.

STATUTE OF LIMITATIONS.

1. *How Pleaded*.—An answer averring that the items mentioned in the complaint accrued more than six years before the commencement of the suit is bad; the averment should be that the cause of action did not accrue within six years next before the commencement of the action. *Indianapolis, etc., R. W. Co. v. Center Tp.*, 38
2. *Same*.—*Amended Complaint*.—An answer averring that the cause of action accrued more than six years next before the filing of the amended complaint is bad; the averment should be, "before the commencement of the action." *Id.*
3. *Eminent Domain*.—*Condemnation for Railroad Right of Way*.—*Recovery of Damages*.—*Statute Applicable*.—In a proceeding under sections 905-912, R. S. 1881, against a railroad company to recover damages occasioned by the appropriation of land taken for a right of way, section 292, R. S. 1881, limiting actions for injuries to real property to six years does not apply. Under section 294, R. S. 1881, such a proceeding must be commenced within fifteen years after the cause of action accrues. *Shurtle v. Louisville, etc., R. W. Co.*, 506

STENOGRAPHER'S REPORT.

See BILL OF EXCEPTIONS, 15.

STREET IMPROVEMENT.

Extension of Time for Completing Improvement.—In the absence of fraud, the time for the completion of a street improvement under a contract may be lawfully extended by a vote of the common council.

Terre Haute, etc., R. R. Co., v. Nelson, 258

STREETS AND ALLEYS.

See MUNICIPAL CORPORATIONS, 11 to 15.

STREET RAILWAYS.

Moving House Across Track.—*Destruction of Wires*.—*Failure of Council to Act*.—The courts have the power to restrain the moving of a house across a street electric railroad when such moving will result in the stopping of the cars an unnecessary length of time, and the cutting or destruction of the wires, even though the common council of the city have failed or refused to take any steps to prevent such injury or destruction. *Williams v. Citizens' R. W. Co.*, 71

SUBROGATION.

1. *Fraudulent Representations of Debtors*.—*Money Advanced to Pay off Liens and Redeem from Sale*.—If a debtor, by fraudulent representations, induces a person to advance money to pay off liens, redeem the debtor's property from sale, and to release his own judgment, which is a lien on such property, such person will be subrogated, as against such debtor, to the rights of the persons whose liens his money went to pay. *Backer v. Pyne*, 238
2. *Same*.—*Volunteer*.—*Who is Not*.—A person who advances money to pay off liens and protect his own interests is not a volunteer. *Id.*

3. *Same.—Keeping Lien Alive.*—A lien will be kept alive where equity requires it and the parties intended that it should not be extinguished. *Ib.*
4. *Same.—Subsequent Lien Holder.—When Subrogated to Lien Prior to Lien of Third Person.*—Money paid by a mortgagee, to remove prior liens, under the belief, induced by fraudulent representations of the mortgagor, that his mortgage would become the senior lien, is entitled to be subrogated to the liens he has thus paid off as against a person who knew nothing of such representations, and whose lien is prior to the mortgage lien and junior to the liens satisfied. *Ib.*
5. *Indemnifying Mortgage.—Sale of Land.—Misappropriation of Collateral Security.—Subrogation to Mortgage Held by Person Misappropriating Collateral Securities.*—A. brought suit against B. to foreclose a mortgage the latter had given the former to secure the purchase-money thereof. C. and her husband had previously executed an indemnifying mortgage to D. on the same property B. mortgaged. Subsequently C. and her husband sold the land to A., by whom it was sold to B. At the time of the sale by C. she placed in A.'s hands certain notes and accounts to secure her from loss by reason of the indemnifying mortgage executed to D. A. undertook to collect the notes and accounts and to properly apply their proceeds; but she, after collecting such proceeds, appropriated them to her own use. The indemnifying mortgage executed to D. was released and satisfaction entered of record. *Held*, that C. was entitled to so much of the proceeds of A.'s mortgage, and to be subrogated thereto, as would satisfy her claim against A. *McGuffey v. McClain, 327*
6. *Same.—Following Property.—Change of Form.*—The form into which property changes is not material, for equity will follow the property into whatever form it may assume in order to secure it for the person entitled to it. *Ib.*

SUICIDE.

See LIFE INSURANCE, 1, 2.

SUMMONS.

See NUNC PRO TUNC ENTRY, 4.

SUPERINTENDENT OF COUNTY ASYLUM.

See COUNTY COMMISSIONERS, 1, 3, 4.

SUPREME COURT.

See INSTRUCTIONS TO JURY, 2; PRACTICE, 3, 4, 10, 31, 32.

SURVEY.

See BOUNDARIES, 2, 3.

SURVIVAL OF ACTION.

See ACTION, 5.

TAXES.

See SCHOOLS.

1. *Wife Purchasing Land Held by Her Husband as Tenant at Tax Sale.*—A wife may purchase at tax sale land occupied by her husband as tenant, and will acquire at least a valid lien for the amount of the purchase-price; and the mere fact that there is an agreement, of which she has knowledge, between him and his landlord to the effect that he is to pay the taxes will not avoid the sale. *Willard v. Ames, 351*
2. *Same.—Duty of Wife to Pay Husband's Taxes.*—A wife is under no legal obligation to pay the taxes due on her husband's land. *Ib.*

3. *Same.—Person in Possession.—Agreement to Pay Taxes.—Purchase at Tax Sale.*—A person in possession of land, under covenant to pay taxes, can not permit the land to be sold and acquire title against the rightful owner by becoming the purchaser at the tax sale. *Ib.*
4. *Same.—Who Can Not Purchase at Tax Sale.*—Neither an agent, attorney, tenant in common or for life, nor a mortgagor can acquire title to land of his principal or against the mortgagee, by purchase at tax sale. *Ib.*
5. *Same.—Payment or Tender of Taxes.—Suit to Set Aside Sale.*—A sale for taxes will not be set aside and declared void until the taxes actually due are paid or tendered. *Ib.*

TAX SALE.

See TAXES, 1, 3 to 5.

TIME.

See BILL OF EXCEPTIONS, 2 to 5; REDEMPTION.

TITLE.

See JUSTICE OF THE PEACE; PLEADING, 5; REAL ESTATE.

TITLE OF ACT.

See CONSTITUTIONAL LAW, 10.

TORT.

See ABATEMENT; JUDGMENT, 20.

TOWNSHIP TRUSTEE.

Death of Candidate After Close of Polls and Before Result Ascertained.—Election in November.—Vacancy.—Appointment.—A. was a township trustee. At an April election B. and C. were opposing candidates for the office. After the polls closed and before the result was announced B. died. On completion of the count it was found that B. had received a majority of the ballots. At the following November election D. and A. were opposing candidates for the office, and D. received a majority of the ballots, was declared elected, and filed his bond as such trustee. In the following December the board of county commissioners declared that there was a dispute concerning the validity of the election, and appointed D. trustee, but he filed no new bond and took no steps to qualify under this appointment.

Held, that no vacancy had ever occurred in the office; that the election of November was void, and that C. was the legal trustee of the township, holding over until his successor had been duly elected and qualified. *Kimberlin v. State, ex rel., 180*

TRESPASS.

See JURISDICTION, 2.

TRUST.

Construction of Deed.—Revocation of Trust.—Meaning of Term "Legal Representative," as Used in Deed.—Testamentary Deed.—The owner of land, for a recited money consideration, executed to a grantee a quitclaim deed, to have and "to hold the same to the" grantee, "in trust, for the uses and purposes following:" (1) "The trustee, as aforesaid, shall sell and convey all such part or parts of the real estate hereby conveyed as to him shall seem most advantageous for the interest of the trust hereby created, and the proceeds thereof to invest for the same purposes for which this trust is created, to expend the same in improving such of the property hereby conveyed as the said trustee shall deem most advisable, and for the purpose of creating an income

therefrom; (2) that of the income and profits arising under this trust a reasonable sum, such as said trustees shall deem to be sufficient, shall be expended for the maintenance of the grantor, and the remainder, if any, after paying taxes, insurance and necessary expenses, shall be expended for the benefit of the trust, when and at such times as the trustee shall think best;" (3) that upon the death of the said grantor the property hereby placed in trust shall descend to the legal representatives of the said grantor, "provided, however, that" the grantor's adopted brother "shall, under no circumstances whatever, inherit or be entitled to any part or parcel thereof."

Held, that the legal title vested in the trustee, and that he, with the consent of the grantor, could not revoke the trust.

Held, also, that the term "legal representative," as thus used, meant the heirs of the grantor.

Held, further, that the instrument was not a testamentary deed.

Ewing v. Jones, 247; *Ewing v. Carson*, 597; *Ewing v. Lemcke*, 600; and *Ewing v. Torian*, 600

TRUST AND TRUSTEE.

See INJUNCTION, 5.

ULTRA VIRES.

See CORPORATION.

VACANCY.

See OFFICE AND OFFICER, 2, 4; TOWNSHIP TRUSTEE.

VARIANCE.

See BOUNDARIES, 3; PRACTICE, 6.

VERDICT.

See CRIMINAL LAW, 19; SPECIAL FINDING.

1. *Directing, when Evidence is Conflicting*.—Where the evidence relating to any material question of fact is conflicting, the court can not, as to such question, direct a verdict.

Cincinnati, etc., R. W. Co. v. Darling, 376

2. *Same.—Evidence Equivocal*.—Where the evidence, although uncontradicted, is equivocal in its character, and is fairly susceptible of two interpretations, one tending to support the claims of plaintiff and the other of the defendant, the court can not direct the verdict. *Ib.*

3. *Special Findings Unauthorized*.—Unauthorized findings inserted in a special verdict must be disregarded. *Kitts v. Wilson*, 492

VERIFICATION.

See PLEADING, 9.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 5.

WAIVER.

See JUDGMENT, 9; PRACTICE, 22.

WAY.

Use by Strangers.—Diversion of Use.—The grant of the right to transport stone from a designated tract of land over a certain tract owned by the grantor, can not be used with the permission of the grantee by a third person for the purpose of carrying stone quarried in another tract of land. *Hoosier Stone Co. v. Malott*, 31

WILL.

See ADVANCEMENT.

1. *Suit by Executor to Quiet Title to Land Devised to Him.—Attacking Validity of Will by Cross-Complaint.*—In an action brought by an executor, claiming the right under the will of his decedent to sell certain real estate devised, against the heirs of such decedent, to quiet title, the validity of the will is necessarily involved, and the judgment quieting title will bar a subsequent action between him and them for its contest; and such heirs may, by a verified cross-complaint, attack the validity of such will, and have the probate thereof set aside. *Mason v. Roll, 260*

2. *Construction.—Life-Estate to Wife and Fee to Son, Charged with Burden.*—A testator gave to his wife his real and personal property "to keep and hold during the term of her natural life, and give her all rights and power to sell and convey as her property, that is if she will never get married again; and after my wife's death my real estate and personal property, together with all I own and possess, with all money due me, shall go over to my son," E., "and his heirs forever." He then gave to E., after his wife's death, all his personal property, money and choses in action, and required him to pay the testator's debts out of the personal property. Then followed a clause providing that at the wife's death the real estate should be appraised at its lowest cash value, and E. was required to pay two-thirds of the amount to the testator's three grandchildren when they arrived at the age of twenty-one years. The testator then adds, in explanation of the language he had used, as follows: "So this is understood that my son," E., "shall be the owner of my property, real and personal, and carry on my business, and out of my real estate he will pay the other parties above named their third part in money."

Held, that the wife took a life-estate in the real estate, and the son, E., took the fee charged with the payment of the two thirds of its value to the grandchildren named. *Kuns v. Puster, 277*

3. *Language of.—How Construed.*—In the construction of wills, courts seek to ascertain and promulgate the intention of the testator. In ascertaining such intention, isolated statements and clauses of the testament will not be selected, and their meaning determined, without any relation to other clauses or parts of the will. The courts will look to the whole instrument, and construe each part with relation to the language used in other parts of the instrument, which sheds any light on the controverted portion of the will.

Eubank v. Smiley, 393

4. *Same.—Item Relating to Real and Personal Property.—Construction of.—Life-Estate.*—A will contained the following item: "I will and bequeath all my property, both real and personal, to my faithful and beloved wife, to do with and dispose of after my decease as she may think best, and I hereby enjoin it upon her to pay all debts which may be due at my decease. And I further declare it to be my will that, at the decease of my wife, my real estate be equally divided among my heirs, and the personal property which she may leave to be disposed of as she may desire." This was the only item in the will relating to the real estate. It was not necessary to sell the real estate to pay debts.

Held, that the item of the will referred to, gave to the widow a life-estate only in the land, and the remainder to the heirs, and that the absolute title to the personal property was in the widow with full power of disposition. *Id.*

WITNESSES.

Separation.—Witness Disobeying Order.—Party not at Fault.—Where a party is without fault, and a witness disobeys an order directing a separation of the witnesses, such party can not be denied the right of having the witness testify, but the conduct of the witness may be shown to the jury upon the question of his credibility. *Taylor v. State, 66*

WORDS AND PHRASES.

See INSURANCE, 1, 3; TRUST.

WRITTEN INSTRUMENT.

See BILL OF EXCEPTIONS, 8, 9.

WRITS AND PROCESS.

See JUSTICE OF THE PEACE.

Non-Resident.—Service of Process Upon.—A non-resident of the State, whose presence in the State is purely voluntary, and for the purpose of personal supervision of a business which he is conducting within the State, may be legally served with process in an action in which he is made defendant. *Reed v. Browning, 575*

END OF VOLUME 130.

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